TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT*

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No one concerned with freedom of expression in the United States today can fail to be alarmed by the unsatisfactory state of first amendment doctrine. Despite the mounting number of decisions and an even greater volume of comment, no really adequate or comprehensive theory of the first amendment has been enunciated, much less agreed upon. Proponents of the "absolute" or "literal" interpretation of the first amendment have failed to define the bounds of their position or to account for such apparent exceptions to the absolute test as the law of libel, the application of child labor laws to the distribution of literature, and the regulation of election campaigns. Their views have therefore been dismissed as impractical or illogical, or both. At the other end of the spectrum, the "balancing" test has tended to reduce the first amendment, especially when a legislative judgment is weighed in the balance, to a limp and lifeless formality. Among intermediate positions, the "clear and present danger" test is the best known; yet not only has this formula often been ignored, but it was discarded in *Dennis* and at any rate is hardly applicable to many of the issues which now arise, such as the extent of the protection afforded by the first amendment from the legislative investigating power. Other efforts to formulate an overall theory have not met outstanding success. Nor has doctrine been evolved to deal with some of the newer problems, where the issue is not pure restraint on government interference but rather the use of governmental power to encourage freedom of expression or the actual participation by government itself in the realm of expression.[1]

This failure to develop a satisfactory theory of the first amendment is hardly surprising. The issues are controversial and the problems complex. The Supreme Court did not seriously commence the task of interpretation until a few decades ago, beginning with the *Schenck* case in 1919. And rapidly changing conditions in the country have presented the issues in new and more difficult forms. Irrespective of the causes, however, there is grave danger in the present situation. Not only are courts and the legal profession in sharp conflict but the public is seriously confused and the first amendment is threatened with disintegration. Under the circumstances, one further attempt to state an acceptable theory may perhaps be pardoned.

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*This article is based upon materials from a book now in preparation dealing in more elaborate fashion with freedom of expression in the United States. No attempt is made here to treat the provisions of the first amendment which relate to freedom of religion.

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1. The various current legal doctrines are discussed in more detail later in this article, at which point some of the major literature in the field is cited. The debt of the present writer to much of this material, while only infrequently acknowledged by specific footnoting, is obvious.

The first task is to bring together all the basic considerations which must enter into any formulation of first amendment doctrine that goes beyond the merely verbal level. The fundamental purpose of the first amendment was to guarantee the maintenance of an effective system of free expression. This calls for an examination of the various elements which are necessary to support such a system in a modern democratic society. Some of these elements found early articulation in the classic theory of free expression, as it developed over the course of centuries; others are the outgrowth of contemporary conditions. More specifically, it is necessary to analyze (I) what it is that the first amendment attempts to maintain: the function of freedom of expression in a democratic society; (II) what the practical difficulties are in maintaining such a system: the dynamic forces at work in any governmental attempt to restrict or regulate expression; and (III) the role of law and legal institutions in developing and supporting freedom of expression. These three elements are the basic components of any comprehensive theory of the first amendment viewed as a guarantee of a system of free expression.

The second task is to formulate legal doctrine which takes into account these basic factors, which gives legal effect to the fundamental decisions made in adopting the first amendment, and which provides the courts with guidelines sufficiently specific and legal in character as to enable them to perform their judicial function in supporting the system. We must therefore undertake (IV) a statement of the general principles upon which such legal doctrine must be based, and (V) an attempt at a formulation of some detailed rules of law that should govern the various types of first amendment problems which arise in our society today.

Within the confines of this article, of course, it is not possible to do more than sketch broadly the various propositions put forward, stating them in abbreviated, at times conclusory and indeed tentative form.

I. The Function of Freedom of Expression in a Democratic Society

The right of the individual to freedom of expression has deep roots in our history. But the concept as we know it now is essentially a product of the development of the liberal constitutional state. It is an integral part of the great intellectual and social movement beginning with the Renaissance which transformed the Western world from a feudal and authoritarian society to one whose faith rested upon the dignity, the reason and the freedom of the individual. The theory in its modern form has thus evolved over a period of more than three centuries, being applied under different circumstances and seeking to deal with different problems. It is sufficient for our purposes to restate it in its final, composite form, as it comes to us today.

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4)

as maintaining the balance between stability and change in the society. We consider these in their affirmative aspects, without regard at this time to the problems of limitation or reconciliation with other values.[2]

A. *Individual Self-Fulfillment*

The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. Man is distinguished from other animals principally by the qualities of his mind. He has powers to reason and to feel in ways that are unique in degree if not in kind. He has the capacity to think in abstract terms, to use language, to communicate his thoughts and emotions, to build a culture. He has powers of imagination, insight and feeling. It is through development of these powers that man finds his meaning and his place in the world.

The achievement of self-realization commences with development of the mind. But the process of conscious thought by its very nature can have no limits. An individual cannot tell where it may lead nor anticipate its end. Moreover, it is an *individual* process. Every man is influenced by his fellows, dead and living, but his mind is his own and its functioning is necessarily an individual affair.

From this it follows that every man—in the development of his own personality—has the right to form his own beliefs and opinions. And, it also follows, that he has the right to express these beliefs and opinions. Otherwise they are of little account. For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.

Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature. What Milton said of licensing

2. Major sources in the development of the theory include: MILTON, AREOPAGITICA (1644); LOCKE, TWO TREATISES OF GOVERNMENT (1690), ESSAY CONCERNING HUMAN UNDERSTANDING (1690), and LETTERS ON TOLERATION (1690); the writings of Jefferson and Madison; JOHN STUART MILL, ON LIBERTY (1859); BAGEHOT, THE METAPHYSICAL BASIS OF TOLERATION (1874); the decisions of Holmes, Brandeis and many other Supreme Court justices; CHAFEE, FREE SPEECH IN THE UNITED STATES (2d ed. 1941) and THE BLESSINGS OF LIBERTY (1956); LASKI, AUTHORITY IN THE MODERN STATE (1927) and LIBERTY IN THE MODERN STATE (1930); MEIKLEJOHN, POLITICAL FREEDOM (1960). The best reference to the English and American material of the seventeenth and eighteenth centuries is LEVY, LEGACY OF SUPPRESSION (1960). For bibliography through the middle of 1958, see 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES ch. III (2d ed. 1958). Later material includes ADLER, THE IDEA OF FREEDOM (1958, 1961); GELLHORN, AMERICAN RIGHTS (1960); MULLER, ISSUES OF FREEDOM (1960); KIRCHHEIMER, POLITICAL JUSTICE (1961); HANDLIN, THE DIMENSIONS OF LIBERTY (1961). Material from the social sciences which tends to support some of the basic assumptions of the theory includes FROMM, ESCAPE FROM FREEDOM (1941), MAN FOR HIMSELF (1947), and THE SANE SOCIETY (1955); MANNHEIM, MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION (1948); COSER, THE FUNCTIONS OF SOCIAL CONFLICT (1956); KORNHAUSER, THE POLITICS OF MASS SOCIETY (1959); BAY, THE STRUCTURE OF FREEDOM (1958).

of the press is equally true of any form of restraint over expression: it is "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him."[3]

The right to freedom of expression derives, secondly, from basic Western notions of the role of the individual in his capacity as a member of society. Man is a social animal, necessarily and probably willingly so. He lives in company with his fellow men; he joins with them in creating a common culture; he is subject to the necessary controls of society and particularly of the state. His right to express his beliefs and opinions, in this role as a member of his community, follows from two fundamental principles. One is that the purpose of society, and of its more formal aspect the state, is to promote the welfare of the individual. Society and the state are not ends in themselves; they exist to serve the individual. The second is the principle of equality, formulated as the proposition that every individual is entitled to equal opportunity to share in common decisions which affect him.

From these concepts there follows the right of the individual to access to knowledge; to shape his own views; to communicate his needs, preferences and judgments; in short, to participate in formulating the aims and achievements of his society and his state. To cut off his search for truth, or his expression of it, is thus to elevate society and the state to a despotic command and to reduce the individual to the arbitrary control of others. The individual, in short, owes an obligation to cooperate with his fellow men, but that responsibility carries with it the right to freedom in expressing himself.

Two basic implications of the theory need to be emphasized. The first is that it is not a general measure of the individual's right to freedom of expression that any particular exercise of the right may be thought to promote or retard other goals of the society. The theory asserts that freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society. The society may seek to achieve other or more inclusive ends—such as virtue, justice, equality, or the maximum realization of the potentialities of its members. These problems are not necessarily solved by accepting the rules for freedom of expression. But, as a general proposition, the society may not seek to solve them by suppressing the beliefs or opinions of individual members. To achieve these other goals it must rely upon other methods: the use of counter-expression and the regulation or control of conduct which is not expression. Hence the right to control individual expression, on the ground that it is judged to promote good or evil, justice or injustice, equality or inequality, is not, speaking generally, within the competence of the good society.

The second implication, in a sense a corollary of the first, is that the theory rests upon a fundamental distinction between belief, opinion and communication of ideas on the one hand, and different forms of conduct on the other. For shorthand purposes we refer to this distinction hereafter as one between "expression" and "action." As just observed, in order to achieve its desired goals,

3. MILTON, AEROPAGITICA 21 (Everyman's Library ed. 1927).

a society or the state is entitled to exercise control over action—whether by prohibiting or compelling it—on an entirely different and vastly more extensive basis. But expression occupies a specially protected position. In this sector of human conduct, the social right of suppression or compulsion is at its lowest point, in most respects non-existent.

This marking off of the special area of expression is a crucial ingredient of the basic theory for several reasons. In the first place thought and communication are the fountainhead of all expression of the individual personality. To cut off the flow at the source is to dry up the whole stream. Freedom at this point is essential to all other freedoms. Hence society must withhold its right of suppression until the stage of action is reached. Secondly, expression is normally conceived as doing less injury to other social goals than action. It generally has less immediate consequences, is less irremediable in its impact. Thirdly, the power of society and the state over the individual is so pervasive, and construction of doctrines, institutions and administrative practices to limit this power so difficult, that only by drawing such a protective line between expression and action is it possible to strike a safe balance between authority and freedom.

B. *Attainment of Truth*

In the traditional theory, freedom of expression is not only an individual but a social good. It is, to begin with, the best process for advancing knowledge and discovering truth.

Considered in this aspect, the theory starts with the premise that the soundest and most rational judgment is arrived at by considering all facts and arguments which can be put forth in behalf of or against any proposition. Human judgment is a frail thing. It may err in being subject to emotion, prejudice or personal interest. It suffers from lack of information, insight, or inadequate thinking. It can seldom rest at the point any single person carries it, but must always remain incomplete and subject to further extension, refinement, rejection or modification. Hence an individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view. He must consider all alternatives, test his judgment by exposing it to opposition, make full use of different minds to sift the true from the false. Conversely, suppression of information, discussion, or the clash of opinion prevents one from reaching the most rational judgment, blocks the generation of new ideas, and tends to perpetuate error. This is the method of the Socratic dialogue, employed on a universal scale.

The process is a continuous one. As further knowledge becomes available, as conditions change, as new insights are revealed, the judgment is open to reappraisal, improvement or abandonment.

The theory demands that discussion must be kept open no matter how certainly true an accepted opinion may seem to be. Many of the most widely acknowledged truths have turned out to be erroneous. Many of the most signifi-

cant advances in human knowledge—from Copernicus to Einstein—have resulted from challenging hitherto unquestioned assumptions. No opinion can be immune from challenge.

The process also applies regardless of how false or pernicious the new opinion appears to be. For the unaccepted opinion may be true or partially true. And there is no way of suppressing the false without suppressing the true. Furthermore, even if the new opinion is wholly false, its presentation and open discussion serves a vital social purpose. It compels a rethinking and retesting of the accepted opinion. It results in a deeper understanding of the reasons for holding the opinion and a fuller appreciation of its meaning.

The only justification for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth. But no individual or group can be infallible, particularly in a constantly changing world.

It is essential to note that the theory contemplates more than a process for arriving at an individual judgment. It asserts that the process is also the best method for reaching a general or social judgment. This is true in part because a social judgment is made up of individual judgments. It will therefore be vitally conditioned by the quality of the individual judgments which compose it. More importantly, the same reasons which make open discussion essential for an intelligent individual judgment make it imperative for rational social judgments. Through the acquisition of new knowledge, the toleration of new ideas, the testing of opinion in open competition, the discipline of rethinking its assumptions, a society will be better able to reach common decisions that will meet the needs and aspirations of its members.

C. *Participation in Decision-Making*

The third main function of a system of freedom of expression is to provide for participation in decision-making through a process of open discussion which is available to all members of the community. Conceivably the technique of reaching the best common judgment could be limited to an elite, or could be extended to most members of the society excluding only those who were felt to be clearly unworthy. In its earlier forms the theory was often so restricted. But as the nineteenth century progressed it came to be accepted that all men were entitled to participate in the process of formulating the common decisions.

This development was partly due to acceptance of the concept that freedom of expression was a right of the individual, as discussed previously. But it was also inherent in the logic of free expression as a social good. In order for the process to operate at its best, every relevant fact must be brought out, every opinion and every insight must be available for consideration. Since facts are discovered and opinions formed only by the individual, the system demands that all persons participate. As John Stuart Mill expressed it, "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[4]

4. MILL, ON LIBERTY AND OTHER ESSAYS 20 (Neff ed. 1926).

But in addition to these reasons, the right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically-organized society. The growing pressures for democracy and equality reinforced the logical implications of the theory and demanded opportunity for all persons to share in making social decisions. This is, of course, especially true of political decisions. But the basic theory carried beyond the political realm. It embraced the right to participate in the building of the whole culture, and included freedom of expression in religion, literature, art, science and all areas of human learning and knowledge.

In the field of political action, as just mentioned, the theory of freedom of expression has particular significance. It is through the political process that most of the immediate decisions on the survival, welfare and progress of a society are made. It is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. Freedom of expression in the political realm is usually a necessary condition for securing freedom elsewhere. It is in the political sector, therefore, that the crucial battles over free expression are most often fought.

As the general theory makes clear, freedom of discussion in public affairs serves an important function regardless of whether the political structure of a nation is democratic or not. Every government must have some process for feeding back to it information concerning the attitudes, needs and wishes of its citizens. It must, therefore, afford some degree of freedom at least to some of its citizens, to make known their wants and desires. Indeed in a more formal aspect—as a petition for redress of grievances—this right of communicating to the government in power was one of the earliest forms of political expression. The Magna Carta and the Bill of Rights of 1689, for instance, were promulgated in response to such petitions. In general, the greater the degree of political discussion allowed, the more responsive is the government, the closer is it brought to the will of its people, and the harder must it strive to be worthy of their support.

The crucial point, however, is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government. Once one accepts the premise of the Declaration of Independence —that governments derive "their just powers from the consent of the governed" —it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment. Together with the argument for freedom of religious belief, this proposition was the one most frequently and most insistently urged in support of freedom of expression.[5]

The proponents of freedom of political expression often addressed themselves to the question whether the people were competent to perform the functions entrusted to them, whether they could acquire sufficient information or possessed sufficient capacity for judgment. The men of the eighteenth century,

5. The implications of this argument have been developed most fully in our times by Dr. Alexander Meiklejohn. See his POLITICAL FREEDOM (1960).

with their implicit faith in the power of reason and the perfectibility of man, entertained few doubts on this score. Political theorists of the nineteenth and twentieth centuries have been more cautious. And there was some disagreement as to whether the right of political expression could safely be extended to societies which had not reached a certain point in the development of education and culture. But these problems were actually questions concerning the viability of democracy itself. And once a society was committed to democratic procedures, or rather in the process of committing itself, it necessarily embraced the principle of open political discussion.

D. *Balance Between Stability and Change*

The traditional doctrine of freedom of expression, finally, embodies a theory of social control. The principle of open discussion is a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus. This may not always have been true, and may not be true of many existing societies. But where men have learned how to function within the law, an open society will be the stronger and more cohesive one.

The reasons supporting this proposition can only be stated here in summary form. In the first place, suppression of discussion makes a rational judgment impossible. In effect it substitutes force for logic. Moreover, coercion of expression is likely to be ineffective. While it may prevent social change, at least for a time, it cannot eradicate thought or belief; nor can it promote loyalty or unity. As Bagehot observed, "Persecution in intellectual countries produces a superficial conformity, but also underneath an intense, incessant, implacable doubt."[6]

Furthermore, suppression promotes inflexibility and stultification, preventing the society from adjusting to changing circumstances or developing new ideas. Any society, and any institution in society, naturally tends toward rigidity. Attitudes and ideas become stereotyped; institutions lose their vitality. The result is mechanical or arbitrary application of outworn principles, mounting grievances unacknowledged, inability to conceive new approaches, and general stagnation. Opposition serves a vital social function in offsetting or ameliorating this normal process of bureaucratic decay.

Again, suppression of expression conceals the real problems confronting a society and diverts public attention from the critical issues. It is likely to result in neglect of the grievances which are the actual basis of the unrest, and thus prevent their correction. For it both hides the extent of opposition and hardens the position of all sides, thus making a rational compromise difficult or impossible. Further, suppression drives opposition underground, leaving those suppressed either apathetic or desperate. It thus saps the vitality of the society or makes resort to force more likely. And finally it weakens and debilitates the majority whose support for the common decision is necessary. For it hinders

6. Bagehot, *The Metaphysical Basis of Toleration*, in 2 WORKS OF WALTER BAGEHOT 339, 357 (Hutton ed. 1889).

an intelligent understanding of the reasons for adopting the decision and, as Mill observed, "beliefs not grounded on conviction are likely to give way before the slightest semblance of an argument."[7] In short, suppression of opposition may well mean that when change is finally forced on the community it will come in more violent and radical form.

The argument that the process of open discussion, far from causing society to fly apart, stimulates forces that lead to greater cohesion, also rests upon the concept of political legitimation. Stated in narrower and perhaps cruder terms, the position is that allowing dissidents to expound their views enables them "to let off steam." The classic example is the Hyde Park meeting where any person is permitted to say anything he wishes to whatever audience he can assemble. This results in a release of energy, a lessening of frustration, and a channeling of resistance into courses consistent with law and order. It operates, in short, as a catharsis throughout the body politic.

The principle of political legitimation, however, is more broadly fundamental. It asserts that persons who have had full freedom to state their position and to persuade others to adopt it will, when the decision goes against them, be more ready to accept the common judgment. They will recognize that they have been treated fairly, in accordance with rational rules for social living. They will feel that they have done all within their power, and will understand that the only remaining alternative is to abandon the ground rules altogether through resort to force, a course of action upon which most individuals in a healthy society are unwilling to embark. In many circumstances, they will retain the opportunity to try again and will hope in the end to persuade a majority to their position. Just as in a judicial proceeding where due process has been observed, they will feel that the resulting decision, even though not to their liking, is the legitimate one.[8]

In dealing with the problem of social control, supporters of free expression likewise emphasize that the issue must be considered in the total context of forces operating to promote or diminish cohesion in a society. By and large, they theorize, a society is more likely to be subject to general inertia than to volatile change. Hence resistance to the political order is unlikely to reach the stage of disorder unless a substantial section of the population is living under seriously adverse or discriminatory conditions. Only a government which consistently fails to relieve valid grievances need fear the outbreak of violent opposition. Thus, given the inertia which so often characterizes a society, freedom of expression, far from causing upheaval, is more properly viewed as a leavening process, facilitating necessary social and political change and keeping a society from stultification and decay.

Moreover, the state retains adequate powers to promote political unity and suppress resort to force. For one thing it shares the right to freedom of expression with its citizens. While there may be some limits on this power, the state

7. MILL, *op. cit. supra* note 4, at 42.

8. For a discussion of the notion of legitimization, as operating in the judicial process, see BLACK, THE PEOPLE AND THE COURT 56-86 (1960).

is normally in a much better position to obtain information and in a much more authoritative position from which to communicate its official views than the ordinary citizen or group of citizens. More importantly, the state possesses the authority to restrict or compel action. The right with which we are concerned, as already noted, extends only to expression; when the stage of action is reached the great power of the state becomes available for regulation or prohibition. And finally the state has not only the power but the obligation to control the conditions under which freedom of expression can function for the general welfare. This includes not only responsibility for eliminating grievances which may give rise to disorder but also a responsibility for maintaining economic and social conditions under which the ground rules of democracy can operate.

Proponents of the theory acknowledge that the process of full discussion, open to all, involves some risks to the society that practices it. At times there may be substantial delay in the working out of critical problems. There can be no ironclad guarantee that in the end a decision beneficial to society will be reached. The process, by encouraging diversity and dissent, does at times tend to loosen the common bonds that hold society together and may threaten to bring about its dissolution. The answer given is that the stakes are high and that the risks must be run. No society can expect to achieve absolute security. Change is inevitable; the only question is the rate and the method. The theory of freedom of expression offers greater possibilities for rational, orderly adjustment than a system of suppression. Moreover, they urge, as the lesson of experience, that the dangers are usually imaginary; that suppression is invoked more often to the prejudice of the general welfare than for its advancement. To this they add that the risks are the lesser evil, that the alternatives are worse, that the only security worth having is that based on freedom.

Thus, the theory of freedom of expression involves more than a technique for arriving at better social judgments through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of a new society in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited. It is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, skepticism, reason and initiative, will allow man to realize his full potentialities. It spurns the alternative of a society that is tyrannical, conformist, irrational and stagnant. It is this concept of society that was embodied in the first amendment.

It is not within the scope of this article to demonstrate the soundness of the traditional theory underlying freedom of expression, or its viability under modern conditions. The writer believes that such a demonstration can be made. But the significant point here is that we as a nation are presently committed to the theory, that alternative principles have no substantial support, and that our system of freedom of expression must be based upon and designed for the realization of the fundamental propositions embodied in the traditional theory.

II. The Dynamics of Limitation

In constructing and maintaining a system of freedom of expression, the principal problems and major controversies have arisen when the attempt is made to fit the affirmative theory—that is, the affirmative functions served by the system—into a more comprehensive scheme of social values and social goals. The crucial issues have revolved around the question of what limitations, if any, ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society. Most of our efforts in the past to formulate rules for limiting freedom of expression have been seriously defective through failure to take into consideration the realistic context in which such limitations are administered. The crux of the problem is that the limitations, whatever they may be, must be applied by one group of human beings to other human beings. In order to take adequate account of this factor it is necessary to have some understanding of the forces in conflict, the practical difficulties in formulating limitations, the state apparatus necessary to enforce them, the possibility of distorting them to attain ulterior purposes, and the impact of the whole process upon achieving an effective system of free expression.

The starting point is a recognition of the powerful forces that impel men toward the elimination of unorthodox expression. Most men have a strong inclination to suppress opposition even where differences in viewpoint are comparatively slight. But a system of free expression must be framed to withstand far greater stress. The test of any such system is not whether it tolerates minor deviations but whether it permits criticism of the fundamental beliefs and practices of the society. And in this area the drives to repress, both irrational and rational, tend to become overwhelming.

The human propensity to curb unwanted criticism has long been noted by the theorists of freedom of expression. Thus John Stuart Mill, early in his essay *On Liberty,* remarked:

> The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.[9]

The strong innate drive to suppress deviant opinion has also been stressed in modern studies of the authoritarian personality. An attack upon cherished premises tends to create anxiety, especially in those who have a strong inner need for certainty. The deviant opinion is felt as a threat to personal security. And the response tends to be fear, hatred or a similar emotion, from which springs a compulsion to eliminate the source of the danger. In such circumstances it is natural to turn to the state for protection against the supposed evil. Such factors play a prominent part in the formulation of restrictions upon expression and, equally important, in their administration.[10]

9. Mill, *op. cit. supra* note 4, at 18.

10. See, *e.g.*, Adorno, Frenkel-Brunswik, Levinson & Sanford, The Authoritarian Personality 654-726 (1950).

It is necessary to take into account not only the psychology of the orthodox but also the psychology of the dissenter. Persons who stand up against society and challenge the traditional view often have strong feelings for the issues they raise. Others may be influenced by inner tensions which make it difficult for them to "adjust" to the prevailing order. In any event, the dissent is often not pitched in conventional terms; nor does it follow customary standards of polite expression. This tends to increase the anxiety and hostility of the orthodox and thus compounds the problem.[11]

Apart from these inner compulsions at work in a system which undertakes to limit freedom of expression, difficulties arise at the more rational level. To many people their immediate and personal affairs are the most vivid and most compelling. Those who currently dominate a society naturally cling to their economic, political and social position of advantage. Vested interests in the status quo, or in the continuing ignorance of other people, tend to take precedence over the broader interests of society as a whole. Forces of this nature vigorously resist the expression of new ideas or the pressures of the underprivileged who would change existing conditions in the society.

Nor is the longer-run logic of the traditional theory immediately apparent to untutored participants in political conflict. As Justice Holmes put it:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises.[12]

Suppression of opinion thus may seem an entirely plausible course of action. Toleration may appear inconsistent with maintaining order or achieving other ends desired by the majority or the group in power. The dialectics of freedom and order are not always perceived; the apparent paradox is not always readily resolved.

That full understanding and readiness to accept the theory of freedom of expression tends to be an acquired attitude is apparent from the entire history of free expression. It has been common for individuals and groups who demanded freedom of expression for themselves to insist that it be denied to others. Until the nineteenth century most of the theoretical supporters of freedom of expression took this position. And even those who urged a broader view have sought to impose restrictions upon their opponents when they achieved power. Thomas Jefferson himself, after being elected President, wrote to Governor McKean of Pennsylvania objecting to the "licentiousness" and "lying" of the Federalist press and saying, "I have therefore long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses."[13] It is not surprising then that few nations in the past

11. See, *e.g.*, MILL, *op. cit. supra* note 4, at 63-65.

12. Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).

13. Letter to Governor McKean, Feb. 19, 1803, in 8 THE WRITINGS OF THOMAS JEFFERSON 216, 218 (Ford ed. 1897).

have succeeded in maintaining any substantial degree of freedom of expression, and that even those have suffered serious relapses in times of pressure.

Similar attitudes prevail in our own times. Studies of public support for freedom of expression reveal an alarmingly high proportion of the population who are unwilling to apply the basic principles of the theory in practice. One such study by the Gallup Poll in 1953, for instance, showed that 67 per cent of those queried thought that a person "known to favor communism" should not be allowed to make a speech in their city or town. Only 29 per cent thought that such a person should be permitted to speak, and 4 per cent had no opinion. Another study by Samuel Stouffer in 1955 concluded that the willingness to grant freedom of speech to Communists was a function, less of political views or economic status, than of the degree of education.[14]

Taking all these factors into account it is clear that the problem of maintaining a system of freedom of expression in a society is one of the most complex any society has to face. Self-restraint, self-discipline and maturity are required. The theory is essentially a highly sophisticated one. The members of the society must be willing to sacrifice individual and short-term advantage for social and long-range goals. And the process must operate in a context that is charged with emotion and subject to powerful conflicting forces of self-interest.

These considerations must be weighed in attempting to construct a theory of limitations. A system of free expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest possible basis for exceptions. And any such exceptions must be clear-cut, precise and readily controlled. Otherwise the forces that press toward restriction will break through the openings, and freedom of expression will become the exception and suppression the rule.

A second major element in the problem is the inherent difficulty of framing limitations on expression. Expression in itself is not normally harmful, and the objective of the limitation is not normally to suppress the communication as such. Those who seek to impose limitation on expression do so ordinarily in order to forestall some anticipated effect of expression in causing or influencing other conduct. It is difficult enough to trace the effect of the expression after the event. But it is even more difficult to calculate in advance what its effect will be. The inevitable result is that the limitation is framed and administered to restrict a much broader area of expression than is necessary to protect against the harmful conduct feared. In other words, limitations of expression are by nature attempts to prevent the possibility of certain events occurring rather than a punishment of the undesired conduct after it has taken place. To accomplish this end, especially because the effect of the expression is so uncertain, the prohibition is bound to cut deeply into the right of expression.

Moreover, the infinite varieties and subtleties of language and other forms of communication make it impossible to construct a limitation upon expression

14. Gallup Poll, printed in Washington Post, Dec. 5, 1953, p. 16, col. 6; STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES 89-90 (1955). See also LIPSET, POLITICAL MAN 109-11 (1960).

in definite or precise terms. It is not easy to frame a prohibition against certain forms of conduct; but to formulate a prohibition which will embrace the multiplicity of words and meanings which might influence conduct can only be done through language exceedingly broad in scope. Men for generations have found ingenious ways to evade mechanical formulae of censorship. The allegory and the historical allusion are only two of the devices that have been used for such purposes. In order to accomplish what the framers of the limitation seek, the limitation must be couched in a sweeping generalization. This means, of course, that a wide area of expression is brought within the reach of the limitation and enormous discretionary power placed in the hands of those who administer it.

This brings us to a third factor in the dynamics of limitation—the apparatus required for administration and enforcement. Those who are assigned this task already have or soon develop a tendency to pursue it with zeal. At the very least they have a job to do, the continued existence of which depends upon their activeness in performing it. Often their efficiency and possibility of advancement are measured in terms of their success, which means success in restricting expression. Prosecution of unpopular opinion is frequently an important avenue of political advancement, and hence has a special appeal for the politically ambitious. While there has been little study of the psychology of the censor, security officer and investigator, experience demonstrates that many of those attracted to these positions are likely to be more than ordinarily influenced by the fears, prejudices or emotions which furnish the driving force for suppression. Much of the day-to-day work of administration is controlled by persons in the lower echelons of a bureaucracy, where narrow adherence to rigid rules, fear of superiors, and sensitivity to pressures carry the application of restrictions to their extreme limits. And the accompanying techniques of enforcement in the area of expression—the investigations, surveillance, searches and seizures, secret informers, voluminous files on the suspect—all tend to exercise a repressive influence on freedom of expression.

Other features of the administration of a limitation on expression press in the same direction. Thus the very bringing of a prosecution or other governmental proceeding, even where it is not successful, or the simple fact of investigating, can have the most serious impact. The essential point is that the forces inherent in any system of administration tend to drive to excess, and the mere existence of an enforcement apparatus is in itself restrictive.

A fourth element in the practical administration of limitations on freedom of expression is that the objectives of the limitation are readily subject to distortion and to use for ulterior purposes. Many persons do not easily separate the conduct or threatened conduct of those who express unwanted ideas from their expression of hated and feared opinions. Thus opposition to the conduct, or to the potential conduct, readily merges into suppression of opinion. The irresistible drive is not only to oppose the action sought by the minority group but to suppress their advocacy of it. Frequently prosecution of unpopular opinion is used as a screen for opposing necessary social change. And often the limitation becomes a weapon in a political struggle, employed primarily for partisan advantage.

Finally, in analyzing limitations on freedom of expression, there must be taken into account the whole impact of restriction on the healthy functioning of a free society. Limitations are seldom applied except in an atmosphere of public fear and hysteria. This may be deliberately aroused or may simply be the inevitable accompaniment of repression. Under such circumstances the doctrines and institutions for enforcing the limitations are subjected to intense pressures. Moreover, while some of the more hardy may be willing to defy the opposition and suffer the consequences, the more numerous are likely to be unwilling to run the risks. Similarly persons whose cooperation is needed to permit the full flow of open discussion—those who own the means of publication or the facilities for communication—are likely to be frightened into withholding their patronage and assistance.

The dangers of attempting to eliminate what many consider the abuses of freedom of expression were constantly stressed in the struggles to establish an effective system of free expression. James Alexander, the original lawyer for Peter Zenger, who was barred from representing him at the trial, put the point in words that are frequently echoed:

> These abuses of Freedom of Speech are the excresences of Liberty. They ought to be suppressed; but to whom dare we commit the care of doing it? An evil Magistrate, entrusted with a power to punish Words, is armed with a Weapon the most destructive and terrible. Under the pretense of pruning off the exuberant branches, he frequently destroys the tree.[15]

We lack adequate studies of the dynamics of limiting freedom of expression at various times and places throughout our history. Nevertheless, upon the basis of available material concerning the two outstanding eras of suppression in our past—the period of the Alien and Sedition laws and the First World War—the following conclusions seem warranted:[16]

(1) There was a consistent tendency to overestimate the need for restriction upon freedom of expression. No one now questions that the Alien and Sedition Acts were not required to preserve internal order or to protect the country against any external danger. The restrictions of World War I are also now widely acknowledged to have been unnecessary for achieving similar objectives during that period.[17] The immediate inclination of those in power to restrict

15. Philadelphia Gazette, Nov. 17, 1737, quoted in LEVY, LEGACY OF SUPPRESSION 135 (1960). For the similar, and better known statement of Madison, see Madison, *Report on the Virginia Resolutions*, 4 ELLIOT'S DEBATES 571 (1888).

16. The best historical account of the Alien and Sedition laws is J. M. SMITH, FREEDOM'S FETTERS (1956). See also J. MILLER, CRISIS IN FREEDOM (1951). Both books contain bibliographies. On the World War II period, CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) contains the fullest and most realistic discussion of the process of repression in actual operation. For additional material see the bibliography in 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 290-92 (2d ed. 1958).

17. Even a past member of the Maryland Committee on Subversive Activities, Frank Ober, one of the leading restrictionists in the World War II period, believes that the "dangers from subversive organizations at the time of World War I were much exaggerated." 34 A.B.A.J. 645, 742 (1948).

expression is likely to take precedence over a more sophisticated judgment to allow longer-range national factors to come into play.

(2) The forces generated in the administration of limitations on freedom of expression tended to push application of the measures to extremes. This lack of moderation—of sober and reasoned administration—was characteristic of both the Alien and Sedition laws and the World War I restrictions.

(3) The difficulties in framing definite and precise limitations were not solved in either period. The language of restriction—whether couched as a limitation on subject matter or on the type of utterance—remained vague and unruly. Nor did the safeguards designed to mitigate the effect of the limitation operate effectively. Neither the defense of truth, the requirement of intent, nor the assurance of jury trial afforded the speaker any substantial protection.

(4) In both periods, administration of the limitations resulted in the creation of an enforcement apparatus which embodied practices most obnoxious to a free society. These included the use of informers, professional witnesses, excessive searches and seizures, government surveillance of broad areas of political expression, and unfair treatment of offenders and suspects.

(5) In practice the restrictions were employed to achieve objectives quite different from the theoretical purposes of the laws. Under the guise of assuring internal order or protection against external danger, the limitations were in fact utilized as a weapon to achieve political and economic ends sought by the group in control of administration. The Alien and Sedition laws became a major weapon in the Federalist effort to wipe out all political opposition and suppress the egalitarian ideas of the French Revolution. The World War I restrictions operated not only to curtail criticism of the war and the methods by which it was conducted, but to crush the growth of all forms of socialist ideology.

(6) The social gains attributable to the restrictions proved to be minimal. In neither period was the security or welfare of the country appreciably enhanced. Nor did the limitations succeed in achieving national unity or social cohesion.

(7) On the other hand the social losses were heavy. The impact of the restrictions was felt not only by those convicted, but by many who were merely prosecuted, and by countless others who could not accurately judge the boundaries imposed on freedom or who were fearful to take the risk. Enforcement of the restrictions tended to conceal the real issues facing the nation and to divert public attention and resources from their solution. Perhaps most serious of all, the administration of the restrictions resulted in corruption of the entire political atmosphere. The example of illegal and uncivilized methods employed by the government, the bitterness and hostility evoked by enforcement of limitations on expression alone, the encouragement given to public fear and prejudice, all operated to destroy the possibility of rational political discourse.

Similar conclusions can be drawn from other periods in our past, including the suppression of discussion of the slavery issue in the decades prior to the Civil War and the repression of unorthodox views in many localities during

the eighteenth and nineteenth centuries.[18] The more recent wave of restrictions that followed World War II, on which we do not yet have the full perspective of history, will undoubtedly be judged in the same light by future generations. The lesson of experience, in short, is that the limitations imposed on discussion, as they operate in practice, tend readily and quickly to destroy the whole structure of free expression. They are very difficult to keep in hand; the exceptions are likely to swallow up the theory. Maintenance of a system of free expression, therefore, is not an easy task. This is especially true as we confront the conditions of today. We have tended over the years to refine and delineate more carefully the restrictions we seek to impose. But the new problems arising out of modern industrial society make the problem more delicate and troublesome than at any time in our history.

III. The Role of Law and Legal Institutions in Maintaining A System of Free Expression

The American people have frequently been warned that they must not count too heavily upon the legal system for the preservation of democratic liberties. Judge Learned Hand, one of the most eloquent exponents of this view, has made the point in the strongest language:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[19]

Certainly this admonition must be taken to heart. Obviously a perfect set of legal rules and an ideal array of judicial institutions could not by themselves assure an effective system of free expression. Many other factors are critical. There must be a substantial consensus on the values and goals of the society —some minimum area of agreement or acquiescence. The economic structure must provide a certain standard of material welfare, shared broadly by all elements of the population. Political institutions must have some basis in the traditions of the people, must receive some degree of acceptance, must prove reasonably effective in meeting the problems of the society, and must remain capable of adjustment and change. Other institutions, such as private corporations and labor organizations, must permit communication on a diverse scale in important areas of decision-making. There must be some feeling of security in relation to other nations or societies. The educational system, the media of communication, and similar institutions moulding public opinion must have

18. On the slavery issue see Nye, Fettered Freedom (1949); on infringements of civil liberties in local areas, see Whipple, The Story of Civil Liberty in the United States (1927). Generally, see the materials collected in 1 Emerson & Haber, *op. cit. supra* note 16, at 279-85; and Roche, *American Liberty: An Examination of the "Tradition" of Freedom*, in Aspects of Liberty 129 (Konvitz & Rossiter ed. 1958).

19. The Spirit of Liberty, Papers and Addresses of Learned Hand 144 (Dilliard ed. 1959).

some capacity to produce mature and independent members of the local and national community. The general philosophy, attitudes and mental health of the citizenry must be favorable. In short, basic conditions for a viable democratic society must be present.

Yet surely Judge Hand has overstated the case. The legal system is not so peripheral to the maintenance of free expression as his words imply. The experience of mankind demonstrates the contrary. Wherever the principles of free expression have prevailed in a society they have been closely supported by law and legal institutions. This is particularly true, of course, in the United States. The main elements of that role, especially as it has changed in recent years, must be kept in mind in formulating a satisfactory theory of the first amendment.

A. *The General Role of Law*

The legal system is, of course, one of the most effective instruments available to a society for controlling the behavior of its members so as to realize the values and goals sought by that society. Because of certain characteristics of a system of free expression, the role of law is of peculiar significance in any social effort to maintain such a system.

First, a system of free expression is designed to encourage a necessary degree of conflict within a society. To be sure, it attempts to avoid resort to force or violence by channelling this conflict into the area of expression and persuasion. And it contemplates that a longer-range consensus will ultimately be achieved. Yet, because it recognizes the right of the citizen to disagree with, arouse, antagonize and shock his fellow citizens and the government, such an arrangement of human affairs is hardly likely to be self-operating. In its short-term effects it may indeed be highly volatile. Hence the system needs the legitimizing and harmonizing influence of the legal process to keep it in successful balance.

Other features of a system of free expression likewise demonstrate the need for buttressing it through law and legal institutions. The full benefits of the system can be realized only when the individual knows the extent of his rights and has some assurance of protection in exercising them. Thus the governing principles of such a system need to be articulated with some precision and clarity. Doubt or uncertainty negates the process. Furthermore, the theory rests upon subordination of immediate interests in favor of long-term benefits. This can be achieved only through the application of principle, not by ad hoc resolution of individual cases. And it requires procedures adequate to relieve immediate pressures and facilitate objective consideration. All these elements a legal system is equipped to supply.

Further, as already observed, the theory of freedom of expression is a sophisticated and even complex one. It does not come naturally to the ordinary citizen, but needs to be learned. It must be restated and reiterated not only for each generation but for each new situation. It leans heavily upon understanding and education, both for the individual and the community as a whole. The legal process is one of the most effective methods for providing the kind of

social comprehension essential for the attainment of society's higher and more remote ideals.

Finally, the principles of the system must be constantly reshaped and expanded to meet new conditions and new threats to its existence. This requires the deliberate attention of an institution entrusted with that specific obligation and possessing the expertise to perform such a function.

The function of the legal process is not only to provide a means whereby a society shapes and controls the behavior of its individual members in the interests of the whole. It also supplies one of the principal methods by which a society controls itself, limiting its own powers in the interests of the individual. The role of law here is to mark and guard the line between the sphere of social power, organized in the form of the state, and the area of private right. The legal problems involved in maintaining a system of free expression fall largely into this realm. In essence, legal support for such a system involves the protection of individual rights against interference or unwarranted control by the government. More specifically the legal structure must provide:

> (1) Protection of the individual's right to freedom of expression against interference by the government in its efforts to achieve other social objectives or to advance its own interests. This has been in the past the main area of legal concern, and it remains so, although other phases of the problem are assuming increasing importance.
>
> (2) The use, and simultaneous restriction, of government in regulating conflicts between individuals or groups within the system of free expression itself; in protecting individuals or groups from non-governmental interference in the exercise of their rights; and in eliminating obstacles to the effective functioning of the system.
>
> (3) Restriction of the government in so far as the government itself participates in the system of expression.

All these requirements involve control over the state. The use of law to achieve this kind of control has been one of the central concerns of freedom-seeking societies over the ages. Legal recognition of individual rights, enforced through the legal process, has become the core of free society.[20]

One must recognize, of course, that the legal system can be used to undermine or destroy freedom of expression. Often in the past, and still in the present, the judicial process has served the function of legitimizing action that is wholly contrary to the elemental principles of free expression. Indeed, even in the police state, infringements of political freedom are normally accomplished in the name of the law. Yet this fact does not lessen, but rather emphasizes, the power of law and legal institutions as an instrument of social persuasion and control. It underlines the warning that the legal system is not by itself sufficient to guarantee free expression. But it also furnishes evidence that without the support of the legal structure the values of such a system are not likely to prevail in the community.[21]

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20. Generally, on the development of constitutionalism see McILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN (rev. ed. 1947).

21. For an excellent account of the uses of legal process to thwart a system of free expression, see KIRCHHEIMER, POLITICAL JUSTICE (1961).

B. *The Role of Judicial Institutions*

The capacity of the legal order to protect freedom of expression hinges in great part upon the institutions entrusted with the function of translating into legal form, and enforcing, the basic principles of the system. These institutions have deep roots in the Anglo-American legal process. But much of their form and even more of their quality has taken shape only in recent times. This development has proceeded further in the United States than in any other country. It represents, indeed, one of the major contributions of our political system to the democratic way of life.

The main legal institutions upon which we rely for implementing the principles of free expression are (1) a written constitution, embodying an express (if general) statement of the rights guaranteed to the individual; (2) an independent judiciary possessing the power of judicial review over legislative and executive action; and (3) an independent bar. This is not the place for a detailed treatment of the historical background or special function of each of these institutions. But the role played by the judiciary—the most important of the three—merits brief examination.

At the outset it is essential to narrow the issue and establish a fundamental distinction. We are not dealing here with any general function of our judicial institutions to foster the whole range of freedoms in a democratic society. Nor are we dealing with any broad power to supervise or review all major actions of the legislative and executive branches. We are concerned with the specific function of the judiciary in supporting a system of freedom of expression. This involves the application of general principles of law to assure that the basic mechanisms of the democratic process will be respected. It does not involve supervision over the decisions reached or measures adopted as a consequence of employing democratic procedures. Responsibility for this is primarily that of the legislature. In other words the judicial institutions are here dealing essentially with the methods of conducting the democratic process, not with the

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It should be noted that Judge Hand's view of law is not the only one which accords a lesser role to law and legal institutions in the protection of individual rights than the position taken in this article. The entire range of approaches from sociological jurisprudence to the extremes of legal realism implies some denial of the separate effect of law in shaping or achieving social goals. In this view, law tends to be conceived as reflecting either historical forces or culture, or some special interest, and not as exercising in itself a substantial impact upon them. Likewise, the policy-oriented approach to law tends to be opposed to the notion of a systematic theory built around one value or a consistent theory embodying all values from which rules can be drawn that are clearly applicable to a multiplicity of events. From this point of view a general aim involving many conflicting values is held by the decision-maker, who resolves the conflicts as best he can in the light of the general aim, giving one or another of the values greater weight at one time than another. Hence, while there are rules under this approach, they are mostly symbolic and permit decision either way, at best prescribing only extreme outer limits. Both of these approaches, in part at least, grew out of justifications for upholding substantive economic measures of the New Deal type. *Cf.* Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961). The thesis of this article is that, in the field of freedom of expression, law and legal institutions can and should play a more affirmative role.

substantive results of that process. In this differentiation of function lies a generic distinction between the role of the judiciary and the role of the legislature.

Within this narrower context, the part that must be played by the courts in attaining the goal of freedom of expression can be more precisely assessed. The nature of that function is, of course, conditioned by the chief characteristics of our judicial institutions. These may be described as the independence of the judiciary from the other branches of government, its relative immunization from immediate political and popular pressures, the training and quality of its personnel, its utilization of legal procedures, and its powers of judicial review.

In the first place, the judiciary may be said to possess a special competence for dealing with the kind of issues that arise in protecting the mechanisms of the democratic process. The task to be performed is not that of initiating action, but of assuring that action is channeled through acceptable modes of procedure. Hence the judgment relies more upon the knowledge and wisdom derived from historical experience, from broad political and social theory, and from weighing basic values, than upon the kind of information and skill necessary for planning and executing specific projects of economic, political or social regulation. The courts are, in short, specialists in the field of constitutional limitation.

Moreover, if we compare the legislative and executive branches of government with the judicial, it is apparent that the judiciary is the chief institution of the state capable of affording the necessary degree of legal support for a system of free expression. The legislature is subject to the most direct, immediate and constant pressure from the majority or powerful minorities. These pressures largely concern concrete and material objectives, those closest to the daily struggle for livelihood. And the emphasis is strongly upon obtaining results, rather than upon methods. Under such circumstances the forces of self-restraint are often less effective in a legislative body.

Furthermore, legislators are not normally trained or experienced in longer-range historical traditions. Although many are lawyers, they are engaged in day-to-day political struggles which occupy most of their time and attention. The politically ambitious are subject to strong partisan pulls, temptations not easily resisted. The fears, prejudices and other emotions stirred by unorthodoxy are more likely to be reflected in their deliberations. Conversely, the road to political power may run in the direction of an appeal to those very irrational motives, couched in the form of simplistic or demagogic slogans. In short the members of legislative bodies are not likely to be convinced or skilled exponents of the fundamental rules which ultimately must guide political struggles in a democratic system.

Nor does the balance of pressure groups within the legislative institution serve adequately to assure full protection of a system of free expression. This is partly because interest groups of sufficient strength to find representation in the legislature are driven by their own immediate concerns and by the pressures on their own bureaucracy to achieve results. Partly the reason is that in the legislative struggles of the great pressure groups there is none which represents

as such the more general and unorganized interest in preserving fundamental but less immediate values, including freedom of individual expression. Civil liberties organizations and similar associations serve an important function, but their direct influence on the legislative process is not equal to that of the groups organized for economic or political objectives. It is of the essence of the theory of free expression that each single person, even though he be the only one of that view, must be protected in his right of expression. The political structure of the legislature does not fit this theory. Its internal balance is designed principally to safeguard the interests of the majority or powerful minorities. But the right of expression by such groups is least likely to need protection.

Not only has the legislative institution failed to develop within itself the conditions of self-restraint necessary for preserving freedom of individual expression, but the general balance of political forces in the nation, leaving the judicial institution to one side, is not calculated to achieve that objective. The original balance contemplated by the framers of the Constitution was between the popularly-elected House of Representatives on the one hand and the Senate and President, chosen indirectly through the state legislatures, on the other. But this balance was seriously impaired by the popular election of both the Senate and the President. In a broad sense both houses of the legislature and the chief executive now represent the dominant majority or at least a coalition of impressive minorities. Nor does the other major balancing mechanism incorporated in the Constitution—the states versus the federal government—solve the problem. That balance operates through a division of areas in which each government may exercise affirmative power, but it does not prevent infringement of individual or minority rights within the allotted area of power. Consequently, only the judicial institutions remain as a counterforce not directly dependent upon the majority temporarily possessing authority.

In short, protection of interest through a balance of forces in the legislative process presupposes political strength, not only in voting power but in the opportunity to persuade other voters and influence public opinion. Yet the assurance of this political power is one of the very problems that must be solved. Unless such power can be secured in other ways—and it does not automatically follow from a representative system—the technique of balancing forces cannot operate effectively.

This is not to say that legislatures are totally lacking in self-restraint, though much of legislative self-restraint is undoubtedly maintained by the existence of the potential judicial check. Nor is it asserted that legislatures will not normally adhere of their own volition to constitutional limitations. Nevertheless if, even rarely, the legislature does overstep the bounds of the democratic process, it can fundamentally and irrevocably alter the contours of our society.

When we turn to the executive branch the need is even more compelling for an independent institution which, by applying rules of law which embody the fundamental principles of democratic organization can hold governmental action in bounds. The executive may well be less vulnerable to the direct influence of a current electoral majority whose concern for concrete material objectives

makes it impatient with procedural limitations based on a sophisticated abstract theory. Yet the function of the executive is to carry out social policies formulated by the legislature. Its interest is in practical problems of administration. The test of its success is in achieving results, the methods tending to become of secondary importance. Patterns of advancement and recognition press in the same direction. It is frequently subjected to legislative pressures through appropriations, investigations and similar forms of influence. The very size of the executive branch accentuates the problem. The large number of individuals exercising power; the great percentage of officials who may be poorly paid, incompetent or badly trained; the difficulty of communicating policy and maintaining standards in a large organization; and the inflexibility and disregard of human values endemic in a bureaucracy—all tend to minimize the possibility of self-restraint in the executive branch.

Furthermore, no balance of forces operates to protect minority or individual rights. Executive agencies are not usually constituted to represent various elements in a community, even if such a balance were effective. More likely they reflect a single group, or take on the quasi-independent character of a permanent civil service, more or less impervious to the subtleties of minority protection.

All experience with the operations of the executive in applying limitations to freedom of expression—from the English licensing laws to the loyalty programs of the present day—demonstrates that the executive is strongly influenced to carry such restrictions to extremes. There is far more agreement on the necessity of some judicial check upon executive than upon legislative action. On this issue, indeed, there is virtually no disagreement.

The judicial branch of government thus remains as the major institution upon which we must rely for defining and enforcing the ground rules of a system of freedom of political expression. It is our chief hope for an institutional structure which can operate somewhat removed from the political forces that temporarily wield state power, which can speak for the longer-range interests of the community at large, and which is thereby in a position to afford significant protection to individual rights of expression.[22]

C. *The Role of Law and Judicial Institutions in a Modern Democratic Society*

The role of law and judicial institutions in maintaining a system of freedom of expression has, up to this point, been described in general and somewhat abstract terms. We have been inclined to think of these matters as they appeared to the framers of the Constitution or as they emerged with the evolution of the Supreme Court during the nineteenth century. In order to understand their full significance, however, it is necessary to examine more specifically how law and judicial institutions operate amid the concrete realities of the present day.

22. For a recent analysis of the function of our judicial institutions in terms of the political power structure, see Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORNELL L.Q. 175 (1962).

It is apparent that the conditions of freedom in the United States, including freedom of expression, are quite different under twentieth century mass democracy than they were under nineteenth century economic liberalism. And the role of law and judicial institutions has been changing decisively also. As we shall see, the new conditions of American democracy make novel and increased demands upon the legal structure; at the same time they make possible more effective legal support for the realization of individual rights. The failure to recognize these developments has been responsible for much of the uncertainty and hesitation in formulating a comprehensive theory of the part which law and the judiciary must play in supporting a system of free expression. It is possible here to sketch this evolution only in briefest outline.

Throughout the nineteenth century the role of the legal system in directly protecting freedom of expression was a relatively narrow one. The main business of the courts was with property relations, especially with the problem of maintaining a free and unobstructed market which would allow full rein to the creative energies of the people. In constitutional terms this meant concern about state or local interference with a nation-wide market. In common law terms it involved concentration on enforcement of voluntary economic arrangements and the development of legal techniques which facilitated the operation of the market place. The chief function of the courts in the area of individual rights lay in the protection afforded in the process of applying the criminal law. Freedom of expression was more the by-product of the economic and political system than the result of deliberate articulation and enforcement of legal doctrine by the courts. Freedom of association was a natural outgrowth of existing conditions. The mechanisms of communication were left to the operation of the general system of laissez-faire. The federal government had no occasion to restrict individual expression except in a military emergency, and here its powers were seldom contested in the courts. Federal authority did not extend to control over most state, local or non-governmental interference. The state legal systems were entrusted with protection of speech against violent interference by private persons, a task not always adequately performed, but otherwise were seldom called upon to deal with issues of individual expression. All this accounts for the fact that legal implementation of individual rights in free expression lagged well behind the general theory.

Even after 1870, when it became manifest that economic and political laissez-faire in the United States was breaking down, the courts played only a minor role in supporting the right to freedom of expression, or indeed most other individual rights. Well into the twentieth century, judicial attention centered upon issues of property relations. The major constitutional development was the expansion of the due process clause of the fourteenth amendment to protect liberty of contract and to restrict governmental efforts to deal with the problems of economic concentration and the abuses of rising industrialism. Legal problems outside the field of constitutional law concerned primarily such matters as corporate structure and financing. Although the fourteenth amendment gave the federal courts control over state and local action, the Supreme Court, after

the collapse of Reconstruction, exercised its authority beyond the field of property relations only in a minor fashion until the second quarter of the twentieth century. It is typical of the lack of judicial protection of individual rights that the conviction of the Haymarket anarchists, under an extreme application of the doctrine of guilt by association, was remedied (in part) not by the courts but by Governor Altgeld's exercise of executive power. Not until the concern over national security in World War I and its aftermath forced the issues, did the courts start to become aware of the new role that was being thrust upon them.[23]

The changes which have taken place, and which are still in progress, are all essentially the product of technological advances. These changes, in their economic, social and political aspects, are industrialization, urbanization and the proliferation of organization. Their impact upon freedom of expression and the function of law may be summarized roughly as follows:

(1) Industrialization has fundamentally altered the former relationships between property holding and the achievement of individual rights. Concentration of economic power has destroyed the whole structure of numerous independent economic units and eliminated the economic base from which individuals were able to assert their rights against the government and against private power groups. Geographical escape has been cut off. Moreover, the system of free expression can no longer rely for its main support upon the incentive provided by a rising property-holding interest. The driving force must be sought elsewhere. Those groups which now have most to gain from maintaining a fully open society—labor, small farmers, white collar, professional and consumer groups—cannot achieve this objective by insisting on the inviolability of property rights. On the contrary, their interest in change and mobility must be pursued through the force of mass public opinion and political action. Thus realization of their rights now depends upon the existence of law, not its absence; upon affirmative protection of the legal system, not negative resistance to state authority.

(2) The expansion of organization in our society has left the unorganized sectors peculiarly vulnerable to infringement of their rights. Freedom of expression within the organized group (including the government), by the nonbelonging individual, by the small group, and in connection with the organization of new groups, faces overwhelming hazards. In our highly conformist society it is from these sources that much of the social value in freedom of expression springs. Yet these deviant individuals and groups, lacking any other base, must find vindication of their rights primarily in resort to the judicial process.

(3) Large scale and pervasive government, operating on a new order of magnitude and function, poses greater and more subtle threats to individual

23. See HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); Roche, *supra* note 18, at 145. See also Woodard, *Reality and Social Reform: The Transition From Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962).

rights. The government has become an overpowering antagonist in any clash between state and individual. The exercise of authority in many areas, imposing social controls which are acceptable in themselves, tends in actual operation also to circumscribe freedom of expression. Perhaps most important, the danger of distorting legitimate powers for illegitimate purposes has become acute.

(4) Just as the government is now a more formidable foe, so is it a more necessary ally. The breakdown of laissez-faire extends not only to the economic but to other spheres, and our system of free expression is no longer self-operating. The complexities of modern society have introduced into the free market place of ideas blockages and distortions that can only be removed by affirmative social controls. The situation is indeed paradoxical. Freedom of expression is by its very nature laissez-faire; it implies absence of government control. Yet the conditions under which freedom of expression can successfully operate in modern society require more and more governmental regulation.

(5) The far-reaching developments of the twentieth century have brought with them new challenges to our feelings of security and competence, and new difficulties in achieving a necessary consensus amid rapid change. Internally our society is being compelled to face drastic adjustments to novel conditions, major modifications of our whole economic, political and social structure. Externally, we face a fundamental alteration in our relations with the rest of the world. The pace is urgent. Yet as our society has grown older and more institutionalized its rigidities have increased; there has been a crystallization of vested interests and ideas. Pressing against these inflexibilities of the status quo, the insistent forces of change tend to arouse in the body politic anxiety, fear, hostility, frustration and bewilderment. Ofttimes these irrational responses are deliberately stimulated. Probably never before has our society confronted greater possibility of cleavage and disruption.

(6) One of the most significant features of the movement from nineteenth century laissez-faire liberalism to twentieth century mass democracy has been the change in the nature of the political process, particularly the impact of mass public opinion. Because of increased literacy and education, the growth of widespread, rapid communication and the influence of the mass media, public opinion has become broader, more uniform, less independent. Because political issues are more complex, more dependent on specific information not available to the general public, and more remote, public opinion has become more apathetic, less well informed, less focused on precise issues, and less confident. Hence, in mass democracy, public opinion has become more susceptible to manipulation. Frequently this manipulation tends to be demagogic in character, employing broad and often irrational appeals, utilizing slogans and myths, or evoking a scapegoat as an alternative to facing reality. Thus there is much greater need in a mass democracy for countervailing judicial power to protect non-conforming individuals and small minority groups, both in their relations with the legislature and the executive and in their participation in large voluntary associations. There is need also to make as effective as possible the efforts of those leadership groups that are committed to a system of individual rights, whose main weapons are found in an appeal to rational principle and the force of law.

(7) Finally, the evolution of modern society has meant greater participation by the government itself in political expression. Widespread resort to direct coercion by the state is compatible neither with a democratic society nor, in the long run, with a technological society. Modern government strives to achieve unity and control more by the manipulation of public attitudes and opinion than by direct application of official sanctions. Hence, as the area of its control has expanded, the state's interest in affirmative measures of education, persuasion and manipulation has correspondingly increased. Such activities by the state raise obvious problems for a system of free expression, especially where the government possesses a monopoly or quasi-monopoly, as in the field of education. These issues, of course, cannot be solved exclusively by the application of constitutional doctrines or by the workings of judicial institutions. But in any effort to regulate or control direct participation by the government in political expression the courts, from their relatively independent position as mediators between government and the individual, will necessarily play a growing part.

All these developments have placed upon law and judicial institutions a greater responsibility for the maintenance of a system of freedom of expression. It is important to add, however, that many of the same factors operate to improve the possibility that this burden can be successfully assumed.

In the first place industrialization, urbanization and particularly the resulting advance in organizational skill have greatly increased the willingness and capacity of our society to make deliberate use of social power and institutions to achieve social results. Our institutions for applying objective criteria to the solution of controversial issues have grown in scope and prestige. This is reflected particularly in the growing use of law and legal institutions as a method of resolving conflicts in different areas and among differing elements. There is abundant evidence of this development. The progress of administrative law—in which legislators, government attorneys, private practitioners, the bench and the law schools have all cooperated—has brought most government activity within the framework of legal standards and procedures, subject to judicial supervision. As a result many powers formerly exercised outside the legal system have now been brought within it. Large sectors of labor-management relations, once the arena of sharpest conflict, have been reduced to legal order, a spectacular evolution from the turmoil over "government by injunction" of a few decades ago. The decision of the Supreme Court in the recent apportionment case, bringing the judiciary into the settlement of hotly-fought controversies over basic units of representation, is another indication of the remarkable change. Only sixteen years before, the decision had gone the other way and such issues were left to be fought without judicial guidance or control. Thus the consistent trend of our society has been that relations between the state, private centers of power and the individual have become more and more defined and enforced through the elaboration of legal procedures.

Life in our cities has tended to make relations between individuals far more impersonal. Yet this has also had the effect of relieving direct local pressures against dissenting opinion, a problem for which the eighteenth and nineteenth

centuries never found a successful solution. At the same time it permits association on a wider scale with persons holding like views or pursuing the same limited objectives. Centralization of government, by removing protection of individual rights from the tensions and hazards of "direct democracy," has had a comparable effect. Under urbanization and centralization not only have legal rules and institutions become more necessary but they are better adapted to safeguarding the rights of individual dissenters. Where private or governmental controls are applied to individuals at close range, in a situation where relations are face to face and highly personal, they are less subject to legal restraint. But where there is opportunity for the law to resolve conflicts growing out of more remote and impersonal relations, legal institutions operate to better advantage. The formulation and application of abstract general rules—the essence of the legal process—are much more effective in such a context.

Centralization of government has also resulted in far more extensive national control over state and local infringement of individual rights. Since in recent times our experience has been that such infringement is the more likely to occur the lower the level of government, expansion of federal jurisdiction represents a substantial gain. And quite apart from the propensity of the various levels to violate personal liberty, the very existence of another layer of judicial supervision may well afford important additional protection.

Moreover, the advent of mass democracy does not mean that the problem of safeguarding dissenting expression is beyond solution. The increasing literacy, education, skills and material welfare which accompany industrialization are also potential sources of support for democratic institutions. These, indeed, provide the incentive and the power for preserving an open and advancing society. Further, in a modern technological community, as previously noted, social control by sheer force and repression is ultimately impossible under any system which can be called democratic. Certainly such measures cannot be used against a substantial minority, and consequently in one sense the dimensions of the problem are reduced. The task remaining for laws and judicial institutions—that of protecting the rights of individuals and small minorities—is at least one of more manageable proportions.

Finally, the changed relationship of this country to the rest of the world has also brought certain benefits to our own system of individual rights. Our power and influence in world affairs rests in great part upon the appeal of our tradition and practice of personal freedom. The desire—indeed the need—to preserve this "image" of America has frequently spurred us to greater efforts and has noticeably strengthened the position of the judiciary as guardian of the heritage.

To summarize the discussion up to this point, the central issue posed by the twentieth century for our system of free expression is the development of methods for maintaining that system, not as a self-adjusting by-product of laissez-faire, but as a positive and deliberate function of the social process. The underlying theory of freedom of expression remains unaltered. But the legal foundations by which the theory is to be realized have fundamentally changed. What is needed is a consciously-formulated structure of protection, embracing

legal doctrines that are operationally workable and utilizing legal institutions that are equipped to handle the problem. The conditions for successfully accomplishing this task exist. Its achievement presents a basic challenge for our time.

D. *The Role of the Supreme Court*

Inasmuch as the Supreme Court stands at the apex of our judicial institutions, and is by far the most influential of them all, it is perhaps desirable to add a few words specifically concerning the role of that body.[24]

What has been said about judicial institutions in general applies with particular force to the Supreme Court. The character of the individual rights and social values at stake, the kind of forces loosed in prescribing limitations, the necessity for support by law, especially under conditions of mass democracy, all demand that the Court play a positive, indeed almost an aggressive role in this area. By the very nature of the problem—the protection of individual rights against a majority acting through the legislature or the executive—an attitude of "passivism" on the part of the one institution expressly assigned the protecting role cannot meet the requirements of the situation.

The objections urged against an "activist" role for the Supreme Court have, as Judge Hand himself recognized, the least application where the purpose of review is to safeguard a system of freedom of expression.[25] The argument that the courts lack the competence to assume an active role, that they are by nature unsuited for such a task, seems clearly without foundation in this area; on the contrary, for reasons already noted, judicial institutions are peculiarly equipped to deal with these issues. The contention that reliance upon judicial review fosters irresponsibility in other institutions of government and in the public, carries little weight here in light of the political realities of today and our irre-

24. The place of the Supreme Court in our political structure has, of course, been the subject of unending comment and controversy. Most of this discussion has not focused on the precise issue before us—the function of the Supreme Court in supporting a system of freedom of expression—and hence is largely irrelevant to our present purposes. Only a fraction of the literature dealing with the manner in which the Supreme Court should exercise its powers of judicial review can be cited here. The so-called "passivist" approach derives primarily from Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), and is represented by HAND, THE BILL OF RIGHTS (1958); R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955); FREUND, THE SUPREME COURT OF THE UNITED STATES (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), reprinted in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961); McCLOSKEY, THE AMERICAN SUPREME COURT (1960); MENDELSON, JUSTICES BLACK AND FRANKFURTER (1961); BICKEL, THE LEAST DANGEROUS BRANCH (1962). The so-called "activist" position is represented by DOUGLAS, THE RIGHT OF THE PEOPLE (1958); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956); Rodell, *Judicial Activists, Judicial Self-Deniers, Judicial Review and the First Amendment*, 47 GEO. L.J. 483 (1959); McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959); C. BLACK, THE PEOPLE AND THE COURT (1960); Shapiro, *supra* note 22.

25. HAND, *op. cit. supra* note 24, at 69.

versible commitment to the practice. The position that utilization of judicial review in this area is undemocratic is based upon the assumption that democracy is pure majoritarianism and ignores the widespread acceptance of judicial review in the United States as a crucial element in maintaining those mechanisms of the democratic process which safeguard the rights of individuals and minorities against the majority.

The objection that our judicial institutions lack the political power and prestige to perform an active role in protecting freedom of expression against the will of the majority raises more difficult questions. Certainly judicial institutions must reflect the traditions, ideals and assumptions, and in the end must respond to the needs, claims and expectations, of the social order in which they operate. They must not, and ultimately can not, move too far ahead or lag too far behind. The problem for the Supreme Court is one of finding the proper degree of responsiveness and leadership, or perhaps better, of short-term and long-term responsiveness. Yet in seeking out this position the Court should not underestimate the authority and prestige it has achieved over the years. Representing the "conscience of the community" it has come to possess a very real power to keep alive and vital the higher values and goals toward which our society imperfectly strives. Our experience as a nation confirms the strength of the Court's role in this respect; with the possible exception of the eleventh amendment the people have never changed our fundamental law to withdraw individual rights to which the Court has given sanction. In any event, the issue at stake is nothing less than the maintenance of the democratic process. Given its prestige, it would appear that the power of the Court to protect freedom of expression is unlikely to be substantially curtailed unless the whole structure of our democratic institutions is threatened. Even then, we cannot assume that the American people, if the issue were made clear to them, would choose to pursue this course of action. And surely the Court should not, in anticipation of such a turn of events or through a negative or timid attitude, abandon the leadership which history has thrust upon it.

Two corollary propositions may be added, pertaining to the attitude of the Supreme Court toward the two other major institutions of government with which it may come into opposition. In its relations with the legislature the Court should be guided by the crucial distinction between the Court's function in reviewing issues involving the basic mechanisms of the democratic process and issues concerned with the results of that process. In the latter sector the Supreme Court's role is necessarily limited; in the former it is vital and pervasive. The Court's obligation to bow to the will of the legislature and the executive is at a minimum where a serious claim to infringement of freedom of expression on the part of those institutions is presented. In this sense, from the judicial point of view, freedom of expression should be regarded as a "preferred freedom."

In the second place, the Supreme Court should apply the same rules to alleged interference with freedom of expression by state (or local) governments as by the federal government. This is, of course, the accepted doctrine of the Court,

although occasionally suggestions have been made for a relaxation of the rules in their application to the states.[26] As heretofore observed, infringement of freedom of expression is the more likely to occur the lower the level of official involved, and local institutions are less capable of maintaining individual rights than the more remote and often better-staffed institutions at the higher levels. The objection that national uniformity in this area constitutes an unwarranted interference with state or local rights is not sufficiently persuasive to outweigh the advantages and the need of federal supervision. The problem of maintaining an effective system of freedom of expression is today a national, not to say international, problem, and the federal courts have not been able to remain aloof. Actually, the interference with state and local government in this area is minimal, for the federal government is simply enunciating general rules of democratic procedure, not depriving the state of any substantive authority to solve its problems through the extensive powers available to it, or taking over the burdens (and political power) of administration. Hence the impact on the relative powers of the federal and state governments is small. The Supreme Court should not hesitate, or proceed cautiously, in enforcing the fundamental ground rules of the democratic process throughout the nation.

This brief attempt to appraise the role of the Supreme Court has necessarily proceeded at a highly abstract level. The propositions urged are not sufficient to decide any particular case. But they do represent an approach, an attitude, a philosophy. As such they constitute a critical point of departure.

IV. The Formulation of Legal Doctrine: In General

The attainment of freedom of expression is not the sole aim of the good society. As the private right of the individual, freedom of expression is an end in itself, but it is not the only end of man as an individual. In its social and political aspects, freedom of expression is primarily a process or a method for reaching other goals. It is a basic element in the democratic way of life, and as a vital process it shapes and determines the ends of democratic society. But it is not through this process alone that a democratic society will attain its ultimate ends. Any theory of freedom of expression must therefore take into account other values, such as public order, justice, equality and moral progress, and the need for substantive measures designed to promote those ideals. Hence there is a real problem of reconciling freedom of expression with the other values and objectives sought by the good society.

All institutions of society are necessarily involved in this process of reconciliation. We are concerned here, however, with the role of law and judicial institutions. And this requires that, to the extent the courts participate in the

26. See Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Jackson, J., dissenting); Roth v. United States, 354 U.S. 476, 496 (1957) (Harlan, J., dissenting); Rogge, The First and the Fifth 35-53 (1960). The position is implied in Mr. Justice Frankfurter's view of the relationship of the first amendment to the fourteenth amendment. See his opinions in Adamson v. California, 332 U.S. 46, 59 (1947), Beauharnais and Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957).

process, the principles of reconciliation must be expressed in the form of legal doctrine.

The major source of legal doctrine is, of course, the first amendment. Other constitutional provisions—such as the requirement of due process, the privilege against self-incrimination, and the prohibition against unreasonable searches and seizures—are relevant and important; a workable system of free expression must rely upon the whole complex of legal rules designed for the protection of individual rights.[27] But here we limit discussion to doctrines flowing from the first amendment. Within that framework, however, proposals for acceptable doctrine will not be confined to those previously asserted as embodying the meaning of the first amendment or those deduced from prior decisions of the Supreme Court.

This analysis assumes as its fundamental premise the proposition that the framers of the first amendment intended that provision to serve as the legal basis for guarantying an effective system of freedom of expression, and that such fundamental constitutional provisions ought to be interpreted vitally to meet the requirements of the present day. In framing legal doctrine to carry out this basic purpose the analysis necessarily incorporates by reference our previous discussion of the function of freedom of expression in a democratic society, the dynamics of limitation, and the role of law and legal institutions in supporting a system of freedom of expression. Each of these elements must be taken into account in formulating the basic principles of first amendment doctrine and in constructing the specific rules to govern the various kinds of situations in which first amendment problems are posed.

Before attempting these tasks, however, it is necessary to make a partial digression in order to examine the various theories which have from time to time been proposed for reconciling the right to freedom of expression with other social values and objectives.

A. *A Critique of Existing Theories*

At the outset certain general theories of reconciliation which have never received any substantial support as a proper interpretation of the first amendment are rejected. The earliest, and one of the most common in previous periods, was simply to exclude certain groups altogether from the right to freedom of expression. Thus Milton would not have extended the freedom to Catholics, atheists, or non-Christians. Locke apparently would have denied political liberty to Catholics, and would have punished those who "will not own and teach the duty of tolerating all men in matters of mere religion." Some of the earlier supporters of free expression seem to have contemplated that the right should be exercised only by a relatively small elitist group.[28] Today this

27. See Cahn, *supra* note 24, at 476-78.

28. MILTON, *op. cit. supra* note 3, at 37-38; *A Treatise of Civil Power in Ecclesiastical Causes*, in 6 THE WORKS OF JOHN MILTON 13-14 (1932); *Of True Religion, Heresie, Schism, and Toleration*, *id.* at 172-73; Locke, *A Letter Concerning Toleration*, in 6 THE WORKS OF JOHN LOCKE 45 (10th ed. 1801). For a discussion of the theory from Milton to the end of the eighteenth century, with emphasis on the limitations urged, see LEVY, LEGACY OF SUPPRESSION (1960).

theory takes the form that freedom of expression should not be allowed to "anti-democratic" groups.[29] The prevailing current view, however, is that freedom of expression should be extended to all groups, even those which seek to destroy it.[30] This position is the only one consistent with the basic affirmative theory and compatible with successful administration of an effective system.

Likewise, some who support the affirmative theory have argued nevertheless that reconciliation should be framed generally in terms of the nature of the expression. Thus the old law of seditious libel, the suggestion that protection be extended to speech that is true but not to that which is false or misleading, limitations based on evil intent or motive, prohibition of abusive or vituperative communication, and the test of social utility, have all been urged as appropriate standards. These criteria are understandable as the product of an age when the theory was novel and could only be expected to make cautious headway against the long tradition of suppression. But they obviously cannot serve as useful standards for the present day. Some of them may be relevant, though not necessarily controlling, in particular types of situations. But as general standards they are clearly contrary to the affirmative theory, unworkable, and destructive of freedom of expression.

We come then to the major doctrines which have in recent times been enunciated by a majority or minority of the Supreme Court. It is possible to deal with them only in the briefest fashion.

Bad Tendency Test

In the earlier stages of the interpretation of the first amendment, a majority of the Supreme Court accepted the so-called "bad tendency" test. According to this doctrine expression which had a tendency, or which the legislature could reasonably believe had a tendency, to lead to substantial evil could be prohibited. The Court in the *Gitlow* case stated the doctrine broadly, "That a State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare, tending to cor-

29. For expressions of this view, see Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173 (1956); DURBIN, THE POLITICS OF DEMOCRATIC SOCIALISM 275-79 (1940); POPPER, THE OPEN SOCIETY AND ITS ENEMIES ch. 7 (2d ed. 1952); CARR, THE SOVIET IMPACT ON THE WESTERN WORLD 13-17 (1947); LIPPMANN, THE PUBLIC PHILOSOPHY 96-103 (Mentor ed. 1956). See also the material cited in Riesman, *Civil Liberties in a Period of Transition*, in 3 PUBLIC POLICY 33, 52-68 (Friedrich & Mason eds. 1942); Catlin, *On Freedom*, in ASPECTS OF LIBERTY 49 (Konvitz & Rossiter ed. 1958); BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT (1957).

30. CHAFEE, *op. cit. supra* note 16, at 30-35; Riesman, *supra* note 29, at 43; MEIKLEJOHN, *op. cit. supra* note 5, at 42-43, 57, 76-77; DOUGLAS, *op. cit. supra* note 24, at 91-94; American Communications Ass'n v. Douds, 339 U.S. 382, 439 (1950) (Jackson, J.); Dennis v. United States, 341 U.S. 494 (1951). For less clear-cut statements, see Jefferson, *First Inaugural Address, March 4, 1801*, in LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 321 (Modern Lib. ed. 1944); MILL, ON LIBERTY AND OTHER ESSAYS 37, 101-10 (Everyman's Lib. ed. 1927); Bagehot, *The Metaphysical Basis of Toleration*, in 2 WORKS OF WALTER BAGEHOT 326, 343 (Hutton ed. 1889); *but cf. id.* at 358; BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE 40-41 (1945).

rupt public morals, incite to crime, or disturb the public peace, is not open to question." With reference to the particular issue before it—speech thought to endanger the public peace and safety—the Court held that the legislature was entitled to "extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration."[31]

The bad tendency test offers virtually no protection to freedom of expression. In theory, achievement of all other social values or objectives is preferred to allowing expression where any apparent conflict between the two exists. In practice, the doctrine cuts off expression at a very early point on the road to action; significant opposition to the government or its policies, for instance, receives no legal protection. The test has now been abandoned.[32]

Clear and Present Danger Test

In the development of Supreme Court doctrine, the bad tendency test came to be superseded by the "clear and present danger" test. As originally enunciated by Justice Holmes in the *Schenck* case the test was: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[33] The doctrine was elaborated by Justice Brandeis in his *Whitney* opinion, and was extensively employed by the Court in various types of cases until the *Douds* and *Dennis* cases in the early 1950's.[34]

The clear and present danger test represented a substantial advance over the bad tendency test and was welcomed by many supporters of freedom of expression. In theory, it protects some expression even though that expression interferes with the attainment of other social objectives, for the danger to the other interests must be immediate and clear. In practice, by drawing the line of allowable expression closer to the point of action, it opened up a wider area of protection. But there are serious objections to the test:

(1) The formula assumes that once expression immediately threatens the attainment of some valid social objective, the expression can be prohibited. But no very viable system of freedom of expression can exist under such limitations. The basic theory contemplates that conflict with other objectives must occur, and indeed the system can be said to operate only where such con-

31. Gitlow v. New York, 268 U.S. 652, 667, 669 (1925). See also Whitney v. California, 274 U.S. 357 (1927).

32. The *Gitlow* doctrine was urged by the government in the *Dennis* case but rejected by the Court. Dennis v. United States, 341 U.S. 494, 507 (1951).

33. Schenck v. United States, 249 U.S. 47, 52 (1919).

34. Whitney v. California, 274 U.S. 357 (1927); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Dennis v. United States, 341 U.S. 494 (1951) (reviewing the prior decisions). Several significant decisions of this period, notably those in which Chief Justice Hughes wrote the opinion, did not employ the clear and present danger test. See De Jonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931). A recent account of the history of the clear and present danger test, together with a collection of the previous literature discussing it, may be found in McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1203-12 (1959).

flict does take place. To permit the state to cut off expression as soon as it comes close to being effective is essentially to allow only abstract or innocuous expression. In short, a legal formula framed solely in terms of effectiveness of the expression in influencing action is incompatible with the existence of free expression.

(2) The clear and present danger test is excessively vague. As experience has shown, its application by the Court leads to no one ascertainable result. And for the main participants in the system of freedom of expression—police, prosecutors, and other officials on the one hand and the individual seeking to exercise his rights on the other—the test furnishes little clarity in advance of a judicial decision.

(3) In all but the simplest situations the factual judgment demanded of the court is difficult or impossible to make through the use of judicial procedures. If the Supreme Court had taken the factual issue seriously in the *Dennis* case, for example, and attempted to assess whether the utterances of the Communist Party actually constituted a clear and present danger, it would have been plunged into consideration of a mass of historical, political, economic, psychological and social facts concerning the position and influence of the Communist Party in the United States and abroad. This judgment would have included both evaluation and prophecy of a sort no court is competent to give. In many situations, therefore, the test cannot be intelligently applied.[35]

(4) The doctrine grew out of cases where the restriction at issue was a direct prohibition of expression by criminal or similar sanctions, and is of doubtful application to other kinds of interference with freedom of expression. In a legislative investigating case, for example, a rule allowing the committee to inquire about expression that might create a clear and present danger of some substantive evil would seem to impose no limits whatever upon the scope of investigation into expression. And where the regulation in question is not aimed directly at punishing a particular utterance but affects freedom of expression in a more generalized or indirect way, as in a tax law or a disclosure requirement, the issues are not framed in terms of whether a specific utterance creates a specific danger. In any event, the clear and present danger test has not been applied in such cases.

(5) In the course of its development the clear and present danger test was expanded to include other factors than the immediate impact of expression in bringing about action. Thus such elements as the nature and gravity of the evil sought to be prevented, the alternatives open to the government, and the value of the expression in relation to the harm feared were taken into account. When this is done, however, the clear and present danger test becomes indistinguishable from the ad hoc balancing test, discussed next, and is subject to the same infirmities.

35. Mr. Justice Douglas, alone among the justices, did make a serious attempt to apply the clear and present danger test in *Dennis*, relying for his factual material on judicial notice. See Dennis v. United States, 341 U.S. at 585-87. Mr. Justice Douglas has since abandoned the test, at least for most purposes. See, *e.g.*, Scales v. United States, 367 U.S. 203, 262-75 (1961).

The clear and present danger test was abandoned by a majority of the Supreme Court in the *Dennis* case. The substitute—the gravity of the evil, discounted by its improbability—excised the main features of the original test by eliminating or minimizing the requirement that the danger be immediate and clear. The present status of the clear and present danger test is thus in some doubt. There is still some blood remaining in the doctrine, and it has continued to be used in certain types of situations.[36] But, as a general test of the limits of the first amendment, the clear and present danger test must be regarded as unacceptable.

Ad Hoc Balancing

Whereas the bad tendency test accords no weight to the values of free expression, and the clear and present danger test gives them weight only in a limited area, the ad hoc balancing test purports to give them full weight. The formula is that the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression. The test, first clearly enunciated in Chief Justice Vinson's opinion in the *Douds* case, has been employed by a majority of the Supreme Court in a number of subsequent decisions. It is not entirely clear whether the test is meant to be one of general application to all first amendment issues, but it is fair to say that its supporters consider it the dominant theory.[37]

The principal difficulty with the ad hoc balancing test is that it frames the issues in such a broad and undefined way, is in effect so unstructured, that it can hardly be described as a rule of law at all. As a legal doctrine for affording judicial protection to a system of freedom of expression, it is not tenable. More specifically:

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36. The clear and present danger test was recently applied to invalidate a conviction for contempt of court based upon utterances alleged to interfere with a grand jury proceeding. Wood v. Georgia, 370 U.S. 375 (1962). The decision was by a vote of 5 to 2, but all justices participating acquiesced in the use of the test.

37. In addition to the opinion of Chief Justice Vinson in the *Douds* case, 339 U.S. at 394, leading opinions employing the ad hoc balancing test are those of Mr. Justice Frankfurter, concurring in the *Dennis* case, 341 U.S. at 517, and in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 4 (1961); Mr. Justice Harlan in N.A.A.C.P. v. Alabama, 357 U.S. 449, 451 (1958), Barenblatt v. United States, 360 U.S. 109, 111 (1959), and Konigsberg v. State Bar, 366 U.S. 36, 37 (1961); and Mr. Justice Clark, dissenting in Talley v. California, 362 U.S. 60, 67 (1960). The leading opinions criticizing the test are those of Mr. Justice Black in the *Barenblatt, Konigsberg,* and *Communist Party* cases, *supra,* and in Braden v. United States, 365 U.S. 431, 438 (1961). For comment supporting the test see Karst, *Legislative Facts in Constitutional Litigation,* 1960 SUP. CT. REV. 75; MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961); Kauper, Book Review, 58 MICH. L. REV. 619 (1960). For comment criticizing the test see H. Black, *The Bill of Rights,* 35 N.Y.U.L. REV. 865 (1960); Cahn, *Mr. Justice Black and First Amendment "Absolutes": A Public Interview,* 37 N.Y.U.L. REV. 549 (1962); Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom,* 49 CALIF. L. REV. 4 (1961); Frantz, *The First Amendment in the Balance,* 71 YALE L.J. 1424 (1962).

(1) The ad hoc balancing test contains no hard core of doctrine to guide a court in reaching its decision. Rather a court is cast loose in a vast space, embracing the broadest possible range of issues, to strike a general balance in the light of its own best judgment. Not only does the test allow a court to reach either conclusion in almost every case, but the lack of structure makes it realistically impossible for a court to perform its difficult function of applying accepted and impartial rules to hold in check the unruly forces that seek to destroy a system of free expression.

(2) If a court takes the test seriously, the factual determinations involved are enormously difficult and time-consuming, and quite unsuitable for the judicial process. This is even more true here than in the application of the clear and present danger test.[38]

(3) Actually, the test does not allow the judicial institution to exercise any real degree of independent judgment. As applied to date, the test gives almost conclusive weight to the legislative judgment. In the words of its chief exponent, Mr. Justice Frankfurter, the Court will not question the decision of the legislature unless that determination is "outside the pale of fair judgment."[39] It is true that the test does not necessarily compel this excessive deference to the legislature. But the operation of the test tends strongly towards that result. For a court must rest its decision on the broadest considerations of policy, which are normally the grist of legislative determination. A court is therefore in the difficult or impossible position of having either to acquiesce in the legislative judgment or to overrule the legislature on the latter's own ground. In wholesale disregard of the fundamental difference between legislative and judicial functions, the decision is necessarily framed largely in terms of policy or wisdom, rather than in terms of limitation on power.

(4) The test gives no real meaning to the first amendment. As Mr. Justice Black has justifiably protested, it amounts to no more than a statement that the legislature may restrict expression whenever it finds it reasonable to do so, and that the courts will not restrain the legislature unless that judgment is itself unreasonable. The same degree of protection could be obtained under the due process clause, without the first amendment. Surely the first amendment was not intended, and should not be applied, to afford as little support as this for a system of free expression.

(5) The test cannot afford police, prosecutors, other government officials and the individual adequate advance notice of the rights essential to be protected. Moreover, the test is unworkable from the viewpoint of judicial administration, requiring for ultimate decision an ad hoc resolution by the highest tribunal in each case. For these reasons the test is wholly incapable of coping

38. For a summary of the factors which would have to be balanced in order to determine the issue in Barenblatt v. United States, 360 U.S. 109 (1959), see Frantz, *The First Amendment in the Balance*, 71 YALE L.J. at 1443-44 n.87 (1962). The effort of the defense to introduce expert testimony on the balancing issue in a later congressional investigating committee case was rejected by the trial court. United States v. Yellin, 287 F.2d 292 (7th Cir.), *cert. granted*, 368 U.S. 816 (1961).

39. Dennis v. United States, 341 U.S. at 540.

with the dynamic forces evoked by governmental efforts at limitation of expression.

In sum, when examined in the light of our previous analysis of the elements essential to a system of freedom of expression the ad hoc balancing test is, as a legal theory of reconciliation, illusory.

Absolute Test

The so-called "absolute" test is somewhat more unsettled in meaning than the other tests proposed, in part because its opponents have seemingly misunderstood it and in part because its supporters are not in full agreement among themselves. Two things are clear. The test is not that all words, writing and other communications are, at all times and under all circumstances, protected from all forms of government restraint. No advocate of the test, so far as this writer is aware, takes this extreme and obviously untenable position. Nor is the test necessarily one of the "literal meaning," in the sense that one need only look to the wording of the first amendment to find immediately, on the face of the provision, the complete answer to every issue.[40]

Actually, the absolute test involves two components:

(1) The command of the first amendment is "absolute" in the sense that "no law" which "abridges" "the freedom of speech" is constitutionally valid. This proposition has been criticized as self-evident, though supporters of the ad hoc balancing test have at times used language which suggests disagreement with it.[41] And the proposition may not appear to carry the decision-maker very far, since it is still necessary to decide in each case the meaning of "abridge," of "the freedom of speech," and sometimes of "law." But the point being stressed is by no means inconsequential. For it insists on focusing the inquiry upon the definition of "abridge," "the freedom of speech," and if necessary "law," rather than on a general de novo balancing of interests in each case. And the text gives weight to the constitutional decision made in adopting the first amendment by emphasizing that the entire question of reconciling social values and objectives is not reopened. This approach of "defining" rather than "balancing" narrows and structures the issue for the courts, bringing it more

40. Some of the leading statements of the absolute position may be found in dissenting opinions and articles of Mr. Justice Black cited in note 37 *supra*; the concurring opinion of Mr. Justice Douglas in Speiser v. Randall, 357 U.S. 513, 536-37 (1958), and his dissenting opinions in Times Film Corp. v. City of Chicago, 365 U.S. 43, 78 (1961), and Scales v. United States, 367 U.S. 203, 262 (1961); MEIKLEJOHN, POLITICAL FREEDOM (1960), and *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245. For a sympathetic discussion of Justice Black's position see C. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, Harper's Magazine, Feb. 1961, p. 63; and Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). For criticism of the absolute position see the opinion of Mr. Justice Harlan in the *Konigsberg* case, MENDELSON, and Karst, all *supra* note 37; Bickel, *Mr. Justice Black, The Unobvious Meaning of Plain Words*, The New Republic, Mar. 14, 1960, p. 13; McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1193-1203 (1959).

41. See Mr. Justice Frankfurter in Communist Party v. Subversive Activities Control Bd., 367 U.S. at 90-91.

readily within the bounds of judicial procedures. It is true that the process of "defining" requires a weighing of various considerations, but this is not the same as open-ended "balancing." On this aspect of the absolute test all proponents of the doctrine appear to be in agreement.

(2) The absolute test includes another component. It is intended to bring a broader area of expression within the protection of the first amendment than the other tests do. It does this by including a wider sector of government activity within the definition of "abridge," a more extensive area of expression within "the freedom of speech," and at times a broader notion of state action within the term "law."[42] It is perhaps misleading to apply the term "absolute" to this portion of the theory. As already noted, the process does not result in every communication being given unqualified immunity from restriction or regulation under the first amendment. The characterization as "absolute" does serve the purpose, however, of emphasizing the positive features of the constitutional guarantee and limiting the area of restraint.[43]

As to the first component of the absolute test—framing the issue as one of "defining" rather than "balancing"—the proponents of the doctrine are, in the opinion of this writer, entirely correct, though they may not have fully articulated the reasons in terms of the essential elements of a system of freedom of expression. As to the second component—the scope of the protected area of expression—the test remains in an unsatisfactory state, partly because the proponents are in disagreement over their conclusions but primarily because they have never sufficiently defined the terms upon which its application rests. The reasons underlying a choice of definition have never been fully explored. Consequently the test has remained not only vulnerable to attack as embodying merely "an unlimited license to talk,"[44] but as essentially undeveloped and inchoate. This state of affairs is no doubt explainable, at least in part, by the fact that the absolute test has never commanded a majority of the Supreme Court and hence its supporters have never been compelled to face the responsibility of formulating its scope with precision.[45]

The upshot of this analysis of current legal doctrine attempting to reconcile competing values under the first amendment is that the bad tendency test, the clear and present danger test, and the ad hoc balancing test do not afford adequate protection to a system of freedom of expression. Some better theory is urgently needed. The absolute test, while incorporating one basic principle of

42. By way of illustration from Mr. Justice Black's opinions see, on the definition of "abridge," his dissenting opinion in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137-38, 147-69; on the definition of "the freedom of speech" his dissenting opinion in Dennis v. United States, 341 U.S. 497, 579-81; and on the definition of "law" his dissenting opinion in International Ass'n of Machinists v. Street, 367 U.S. 740, 780, 788-91 (1961).

43. For elaboration on this point, see C. Black, Jr., *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, Harper's Magazine, Feb. 1961, p. 63.

44. Mr. Justice Harlan in Konigsberg v. State Bar, 366 U.S. 36, 50 (1961).

45. See Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

a satisfactory theory, has left a host of major issues unresolved and largely unexplored.[46]

B. *General Principles of First Amendment Interpretation*

We come back, then, to the original problem: the formulation of a workable legal doctrine which will take into account the basic factors underlying a system of freedom of expression and which will give effect to the fundamental decision embodied in the first amendment for reconciling freedom of expression with other social values and objectives. Upon the basis of the previous analysis, the essential principles of such a doctrine can be stated as follows:

(1) The root purpose of the first amendment was to assure an effective system of freedom of expression in a democratic society. Its adoption and its continued acceptance implies that some fundamental decisions with respect to reconciliation have been made, that a certain major balancing of interests has already been performed. These judgments, these prior balancings, are those which necessarily flow from the decision to put into operation a system of free expression, with all the values that such a system is intended to secure, in the realistic context of the actual functioning of society and its legal institutions. It follows from our earlier analysis that the judgments made, stated in the most fundamental and general terms, were that expression must be freely allowed and encouraged; that it may not be restricted either for the direct purpose of controlling it or as a method of obtaining other social objectives; and that the attainment of such other objectives is to be achieved through regulation of action. A system of freedom of expression cannot exist on any other foundation, and a decision to maintain such a system necessarily implies a decision on these general propositions.

(2) The function of the courts is not to reopen this prior balancing but to construct the specific legal doctrines which, within the framework of the basic decision made in adopting the first amendment, will govern the concrete issues presented in fitting an effective system of freedom of expression into the broader structure of modern society. This problem may appropriately be formalized, as the absolutists do, in terms of defining the key elements in the first amendment: "freedom of expression," "abridge," and "law." These definitions must be functional in character, derived from the basic considerations underlying a system of freedom of expression which have previously been set forth.

This process does, of course, involve a weighing of considerations. But the task is narrower, taking place within better defined limits, than ad hoc balanc-

46. For other efforts to frame a general theory of the first amendment see, *e.g.*, Comment, *Legislative Inquiry Into Political Activity: First Amendment Immunity from Committee Interrogation*, 65 YALE L.J. 1159 (1956); Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084 (1961); Nutting, *Is The First Amendment Obsolete?*, 30 GEO. WASH. L. REV. 167 (1961). For an effort by a political scientist, see Carr, *The Seesaw Between Freedom and Power*, 57 U. ILL. BULL. 3 (1960). Generally, the materials dealing with first amendment doctrine, up to 1958, are collected in 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES ch. III and IV (2d ed. 1958).

ing. And it results in more specific, more tightly structured, doctrine than the ad hoc balancing approach permits. While the results may not be acceptable to all absolutists, in essence it seeks to accomplish their ultimate aims.

(3) The specific legal doctrines implementing the first amendment must be framed in the light of the dynamics of a system of freedom of expression. It is not sufficient to formulate theory in the abstract, however refined. The rules must be workable in terms of the realities of maintaining a system in the everyday world. Thus the difficulty of framing precise regulations affecting expression, and the forces that tend to distort and overextend them, must be taken into account. The need of the individual to know with some assurance what his rights are, and of government officials to know with some certainty the limits of their power, require that the legal doctrine be constructed with this object as a major consideration. And the requirement of effective judicial administration, especially as concerns the functioning of the Supreme Court, is a critical factor.

(4) Construction of a definition of "freedom of expression" centers around two major problems:

(a) The first task is to formulate in detail the distinction between "expression" and "action." As we have seen, the whole theory and practice of freedom of expression—the realization of any of the values it attempts to secure—rests upon this distinction. Hence the starting point for any legal doctrine must be to fix this line of demarcation. The line in many situations is clear. But at many points it becomes obscure. Expression often takes place in a context of action, or is closely linked with it, or is equivalent in its impact. In these mixed cases it is necessary to decide, however artificial the distinction may appear to be, whether the conduct is to be classified as one or the other. This judgment must be guided by consideration of whether the conduct partakes of the essential qualities of expression or action. In the main this is a question of whether the harm attributable to the conduct is immediate and instantaneous, and whether it is irremediable except by punishing and thereby preventing the conduct. A second factor is also significant. This is whether the regulation of the conduct is, as a practical administrative matter, compatible with a workable system of free expression, a factor discussed above. In formulating the distinction between expression and action there is thus a certain leeway in which the process of reconciling freedom of expression with other values and objectives can remain flexible. But the crucial point is that the focus of inquiry must be directed toward ascertaining what is expression, and therefore to be given the protection of expression, and what is action, and thus subject to regulation as such.[47]

47. In formulating the distinction between "expression" and "action" some of the concepts embodied in the clear and present danger test are utilized. But the approach here differs materially from the clear and present danger approach. It is designed to protect the whole general area of expression, regardless of whether that expression creates a danger of subsequent harm. In borderline cases, however, the determination of whether the conduct is to be treated as expression or action rests upon whether the harm is immediate, whether it is irremediable, and whether regulation of the conduct is administratively consistent with maintaining a system of freedom of expression.

(b) The second task is to delineate those sectors of social activity which fall outside the area in which, under the basic theory, freedom of expression must be maintained. For reasons which will be elaborated later, these alien sectors include certain aspects of the operations of the military, of communication with foreign countries, and of the activities of children. The problem here is not only to ascertain the areas in which freedom of expression is not intended to operate, at least in its classic form, but to construct rules governing those situations where the area of free expression and the alien area interlock.

(5) Application of the term "abridge" is not difficult in many cases. But a problem arises in certain types of situations. The main ones are where a regulation is not a direct restriction of expression but is designed to accomplish another objective, and the impact upon expression is "secondary" or "indirect"; where the regulation is concerned not with reconciling freedom of expression with another social objective but operates within the framework of the system itself by attempting to allocate means of communication or facilitate the working of the system; and where the government itself participates in expression. In these situations the formulation of legal doctrine involves construction of a workable definition of "abridge."

(6) The interpretation of the first amendment in protecting the right of expression against abridgment by private (non-governmental) centers of power revolves around the definition of "law." This problem is essentially the same as that of defining the scope of "state action."

These principles are necessarily general in character. They do not, of course, automatically solve difficult concrete problems in interpretation of the first amendment. All that is suggested is that they furnish a method of approach which places the specific issues in a functional context, yet one within the capacity of judicial institutions to manage.

V. The Formulation of Legal Doctrine In Particular Areas of Freedom of Expression

We are now in a position to consider the formulation of specific legal doctrines applicable to the principal areas in which issues of freedom of expression arise in contemporary society. In the remainder of this article an attempt is made to survey all the chief problems, no matter how troublesome, and to suggest the legal doctrine by which they should be resolved. It is not possible, at this time, to examine at length all the considerations which compel or justify the adoption of a particular rule, or to test a proposed rule by applying it in detail to a variety of actual or potential cases. The most that can be done is to indicate how a particular doctrine may be derived from the basic principles previously stated, and suggest tentative conclusions as to the form the doctrine should take. Such a hurried survey will, of course, leave many unanswered questions, doubts and disagreements. But the hope is that it will demonstrate at least how the issues ought to be framed if we are to achieve a meaningful and effective application of the first amendment.

The major areas fall into five categories: (1) freedom of belief; (2) possible conflict of the right of expression with the other individual interests; (3) pos-

sible conflict with other social interests; (4) regulation designed to facilitate the operation of the system; and (5) government participation in the process of expression.

A. *Freedom of Belief*

Freedom of belief concerns the right of individuals to form and hold ideas and opinions which are not communicated to others. Belief is not, strictly speaking, expression; yet it is so closely related that the safeguarding of the right to hold beliefs is essential in maintaining a system of freedom of expression. The issue involves the protection of such beliefs against government coercion, either by compelling expression of a belief or by imposing a penalty for holding one. More specifically it includes such matters as the requirement of a test oath that includes a statement of belief, legislative inquiry into matters of belief, compelling disclosure of political ideas or opinions, and the use of criminal penalties or other official sanctions to punish those who hold certain beliefs or to deprive them of benefits or privileges otherwise available.

The holding of a belief in the circumstances described is not action or directly locked with action. It must be classified as the equivalent of "expression." The prior balance struck in adopting the first amendment—that governmental regulation must be directed specifically to action and may not generally control action through control of expression—is fully applicable. Thus any alleged conflict between the interest in free expression through protecting the right to hold beliefs, and other individual or social interests, must be deemed resolved in favor of freedom of belief. The legal doctrine, therefore, should be that the holding of a belief is afforded complete protection from state coercion.

The reasons supporting this legal rule are apparent. The attempt to coerce belief is not only one of the most destructive forms of restricting expression but it affords no substantial protection to any legitimate individual or social interest. It invades the innermost privacy of the individual and cuts off the right of expression at its source. It entails insuperable difficulties in administration. The problem of ascertaining belief, especially by the formal procedures of the law, is an impossible one and leaves the individual at the mercy of his prosecutors. The attempt calls forth all the hysteria of the witch hunt and all the apparatus of thought control. The whole process seems incompatible with the existence of free expression.

And nothing of social value is gained. The effort to suppress belief can rarely be successful. It cannot change opinions or substitute better ones. It affects chiefly those among the unorthodox who are men of principle and, by encouraging concealment and deception, destroys the whole basis of public morality. In no event can an unexpressed opinion, in itself, have an adverse effect upon the interests of other individuals or of society. Its indirect effect, through possible translation into subsequent action, is too remote and uncertain to warrant use of the government's immense and destructive powers of coercion.

The Supreme Court has considered the issue in two major decisions. In the *Barnette* case a majority held invalid a state statute imposing a compulsory

requirement that school children recite the pledge of allegiance to the flag.[48] In the *Douds* case the Court, by an equally divided vote, upheld the validity of that part of the Taft-Hartley non-Communist affidavit which required a union officer, as a condition of his union's obtaining the benefits of the National Labor Relations Act, to state that he "does not believe in, and is not a member of or supports any organization that believes in . . . the overthrow of the United States Government by force or by any illegal or unconstitutional methods."[49] The flag salute law, certainly as to the Jehovah's Witnesses involved, required the affirmation of a belief. The Taft-Hartley provision imposed a government sanction for the mere holding of a political belief. Both constituted state coercion of belief. The appropriate principle is that stated in the famous words of Justice Jackson in the *Barnette* case:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[50]

B. *Reconciliation With Other Individual Interests*

Where more than mere belief is involved, and an idea, opinion or statement is actually communicated to others, the possibility of conflict between freedom of expression and other interests becomes more acute. Here the problem of reconciliation may be more troublesome. It becomes necessary to examine separately the various types of interests at stake and the nature of the possible conflict, and to formulate for specific types of situations the legal doctrines which will best achieve the reconciliation within the basic principles embodied in the first amendment.

At the outset a fundamental distinction must be made between interests that are individual or private in character, and interests that are social or public.

48. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

49. American Communications Ass'n v. Douds, 339 U.S. 382 (1950). The vote was 3 to 3. The same issue arose in Osman v. Douds, 339 U.S. 846 (1950), where the vote was 4 to 4. See also Killian v. United States, 368 U.S. 231 (1961). A similar problem was raised in the Lattimore contempt case, but the decision went on other grounds. United States v. Lattimore, 215 F.2d 847 (D.C. Cir. 1954), *indictment dismissed*, 127 F. Supp. 405 (D.D.C. 1955), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955). See also United States v. Ballard, 322 U.S. 78 (1944).

50. 319 U.S. at 642. The fact that children were involved in the flag salute case raises an additional issue as to the extent to which the conduct of children falls within the area of freedom of expression. The case is referred to above only in connection with the Supreme Court's attitude toward coercion of belief generally. The writer would not apply the general rules for freedom of expression to the children in the flag salute case. In his view the issue as to them is more appropriately handled as one of freedom of religion.

Whether a limited qualification of the general principle is necessary in the situation where an individual enters government service is discussed in text accompanying notes 87-88 *infra*. And questions of the government's right to influence belief through participation in the process of expression are likewise considered in text accompanying note 100 *infra*.

Such a distinction is, of course, hard to draw with precision. Obviously, society must be concerned in some sense with all the interests of the individual; it is his welfare and achievements that make up the life of the community. Further, society must consider the relations between two or more individuals, and especially the reconciliation of conflicts between them; otherwise the solution of the controversy may disturb the public order or otherwise affect the general welfare adversely. To some degree, therefore, all conflicts will have mixed private and public implications. Nevertheless, the difference between a wrong to an individual and a wrong to the community has long been recognized in Anglo-American law. It has crucial significance in framing satisfactory principles to govern a system of freedom of expression.

Utilizing this concept, there are certain types of conflict between freedom of expression and interests that may be considered predominantly private in character. These may involve one or both of two elements. The first is where the injury to the individual is direct and peculiar to him, rather than one suffered in common with others and where society leaves the burden of protecting the interest to the individual himself, either by way of granting him a legal cause of action or by requiring him to raise the issue and support his claim. The second is where the interest is an intimate and personal one, embracing an area of privacy from which both the government and one's neighbors ought to be excluded.

Where conflicts of this nature are involved the problem of reconciliation takes on certain attributes not present where broader social or group interests are at stake. In the first place, the harm to the individual interest is more likely to be direct and immediate in its impact, and irremediable by resource to regulation of the subsequent conduct stimulated by the expression. For this reason communication injuring an individual interest is more readily classifiable as "action" than injury to the general social interest which is capable of protection by control of subsequent overt acts. In the second place, the government as umpire of the conflict can be more objective and impartial. Its function is to decide between two individuals, rather than under the pressures of competing social forces. Hence we need have less concern with the vagueness of the criteria for judgment, the subtlety of questions of proof, the creation of an atmosphere of partisanship or hysteria, or other possible abuses of the governmental process. Moreover, where the individual carries the burden of establishing his case, we face fewer administrative problems. It is likely there will be less resources marshaled to restrict freedom of expression; there is no risk of developing a dangerous apparatus of enforcement; the whole process of reconciliation through governmental action will be more loose, more relaxed, and more consistent with an atmosphere of freedom. Finally, when we are dealing with a question of personal privacy, we are in an area, like that of belief, where the interest involved should receive a paramount measure of protection.

In the light of these generalizations, we are in a position to examine specifically the major points at which freedom of expression may come into conflict with significant private interests.

1. Reputation

Of primary concern in the past has been the problem of reconciling the right to freedom of expression with the right to protection against unfair damage to reputation. A communication by one person may subject another to ridicule, hatred or contempt and thereby seriously injure him in the estimation of his fellows. The competing interest here is partly a material one; the communication may cause damage to business or professional standing or to other interests of property. But the interest is also a broader one, extending to all aspects of the personality. A member of a civilized society should have some measure of protection against unwarranted attack upon his honor, his dignity and his standing in the community.

Reconciliation of the interests at stake in this situation has been effected mainly through methods and doctrines embodied in the civil law of libel and slander. Legal action may be brought by the person injured against the offender to recover damages for statements which caused the injury; but in such a proceeding the truth of the statement made constitutes a defense. In a few jurisdictions the truth alone is not a complete defense but must be accompanied by a showing that the statements were published with good motives and for justifiable ends.[51]

Active supporters of freedom of expression have had some difficulty in fitting the law of civil libel and slander into a tightly constructed scheme of first amendment interpretation.[52] But if one takes into account the nature of the conduct involved and the differences between reconciling freedom of expression with private rather than public interests the problem is not insurmountable. First of all, as indicated above, the harm caused by this type of communication tends to be direct and instantaneous, and not remediable by longer-range social processes which can prevent the injury. If we look upon loss of "reputation" as similar to loss of the use of an arm, then, even though there be a later restoration, the injury is immediate. In other words the injury, at least in substantial part, does not flow from action resulting from the communication—action which can be intercepted by regulation addressed specifically to it—but directly from the communication itself. In this sense, therefore, true private defamation tends toward the category of "action," and hence is subject to reasonable regulation.

Other factors work toward the same resolution. The requirements of truth and good motive are, of course, exceedingly vague and difficult of application. They are not acceptable as a general measure of the limitation to freedom of

51. I HARPER & JAMES, TORTS § 5.20 n.6 (1956).

52. Mr. Justice Black, for example, finds the law of libel incompatible with the first amendment, thus eliminating it altogether in both federal and state legal systems, Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 557-58 (1962). Dr. Meiklejohn draws a distinction between "public speech," entitled to absolute protection under the first amendment, and "private speech" entitled only to protection against unreasonable restrictions under the due process clause. MEIKLEJOHN, POLITICAL FREEDOM 39-42 (1960). But since libelous speech could deal with "public" as well as "private" matters, this distinction seems inadequate in respect to this problem.

expression. But in this context—in a private law suit where the opposing interest is essentially a private one—they would appear to constitute justifiable standards. The restriction on expression is imposed within narrow bounds, in a situation where the government can effectively perform the role of umpire. No serious abuses of official administration are normally encountered. The values attached to the expression, both as an individual right and as serving a social and political purpose, are likely to be of least relative significance. And the private interest protected is one of considerable moment. Under all the circumstances it is unlikely, and experience with the civil law of libel and slander confirms the theoretical point, that the limitation results in any serious impairment of the right to freedom of expression.

It is true that more difficult issues arise where the public interest becomes more directly involved, as where the person who considers his reputation impaired is a public official, a candidate for public office, or someone functioning in the public arena, such as a political commentator, an author, or one who otherwise addresses the public. If the damaging statement affects such a person purely in his private and personal capacity, the ordinary principles of libel and slander would obtain. On the other hand, if the alleged defamation relates essentially to the public performance of the person claimed to be injured, the issue is no different from the problem of criminal libel, discussed below. There remains, however, an intermediate category where the alleged defamation is mixed in character, pertaining to both private and public capacities. This occurs, for example, where the honesty of an official in connection with the discharge of his public duties is challenged. The best resolution of such a problem would appear to be through the development of a doctrine of fair comment.[53] Under such a rule, the communication would be protected if it is based upon the facts, or what a reasonable man would accept as the facts, is fair, and is not malicious. This standard of fair comment, if rigorously pressed against unpopular defendants, could cut off much public discussion. Still it may be justified if employed only in private litigation and if the judiciary accepts its obligation to act as a firm defender of the first amendment interest. The possibility of local abuse in this situation, perhaps the chief source of concern, is substantially lessened by the supervisory powers of the federal courts, particularly the Supreme Court. All in all the problem has thus far not appeared to be a serious one, or one which the Supreme Court could not readily keep in check.

A different question is raised where freedom of expression is restricted by the law of criminal libel. This involves a criminal prosecution, brought by the government, for punishment of libelous statements. Truth has customarily not been recognized as a defense unless the accused can show in addition that the communication was made with good motives and for justifiable ends. In this respect the law of criminal libel is similar to the early law of seditious libel, prior to the statutory modification which established truth as a defense. The theory of the prosecution for criminal libel is that a public interest is involved because the publication would otherwise result in personal vengeance by the

53. 1 HARPER & JAMES, TORTS § 5.28 (1956).

person defamed or his friends, thus leading to a breach of the peace or other public disorder. The competing interest here, therefore, is the public interest in preserving order, a matter discussed subsequently. But a brief comment may be made at this point.

According to the theory underlying criminal libel the harm to be prevented is the action, in the nature of disorder or similar conduct, which it is feared may flow from the utterance. In this, it differs from civil libel where, as we saw, there was no action distinct from the communication itself which could be intercepted by regulation. For this reason, the communication involved in criminal libel prosecutions can not be classified as "action." The prior balancing in favor of protecting expression, embodied in the first amendment, here compels acceptance of the legal doctrine that criminal libel laws are invalid. And this conclusion would stand whether truth is accepted as a complete defense or the standard remains in its present form. In earlier times, when honor was more often defended by force of arms, the problem of preserving the peace may have been more difficult. But under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation. Society has other means at its disposal for achieving its goal, methods which are effective in comparable kinds of private disputes. On the other hand, in the context of a public prosecution the dangers in punishing expression under the necessarily loose standards invoked are, for reasons already stated,[54] great. Criminal libel, when resorted to, can only result in suppressing unpopular expression. It would not be greatly different in its impact than employment of the law of seditious libel.

For much the same reasons group libel statutes do not square with an effective system of free expression. In addition, this type of legislation creates an especially acute dilemma. If truth is not allowed as a defense to the prosecution, clearly the infringement upon expression would cut very deep; but if proof of truth is permitted, the prosecution provides a wider, a more dramatic, and a partially official, forum for publication of the alleged defamatory statements.

The Supreme Court has not squarely faced the issue of the validity of a criminal libel statute. But in *Beauharnais v. Illinois* it sustained a group libel statute. The dissent of Justices Black and Douglas in *Beauharnais* would appear to state the appropriate doctrine.[55]

2. Fair Trial

Freedom of expression may also come into conflict with private interests in the administration of justice. The problem here is principally the extent to

54. See the discussion of these dangers and the likelihood of their absence in civil libel suits in text following notes 50-52 *supra*.

55. Beauharnais v. Illinois, 343 U.S. 250 (1952). For a discussion of the damages to a system of free expression in group libel laws see PEKELIS, LAW AND SOCIAL ACTION 187-93 (1950); Note, *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, 61 YALE L.J. 252 (1952). On criminal libel see Note, *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. REV. 521 (1952); Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295 (1958).

which limits should be imposed upon the prosecution and the press in their treatment of dramatic criminal cases. Many such matters are handled in a manner which arouses intense hostility to the accused and makes a fair trial unlikely or unobtainable. The issue is surely a serious one. And it can scarcely be dismissed on the ground that the interest in unlimited utterance requires disregard of specific and grievous injury to the individual.

Using the basic approach already suggested, a satisfactory reconciliation of competing interests here seems feasible within the confines of the first amendment. Two different aspects of the problem should be distinguished. One is the situation where the communication in issue may adversely affect the jurors, witnesses or other parties. The other arises when the hostile utterance is directed at the court or the general administration of justice. The distinction between the two types of cases is crucial in reaching a satisfactory solution.

In the first situation the impact of the communication, similar to private defamation, has the essential characteristics of "action": in its prejudicial effect the harm tends to be immediate and irremediable.[56] On this premise the principle of reconciliation should be one of accommodating the two interests —freedom of communication and the obtaining of justice—under rules administered by the courts. The limiting rules can be framed with some degree of objectivity, preferably by the legislature. They would include regulations concerning the issuance by the government or the parties of statements relating to confessions, admissions, opinions of guilt, prospective testimony, credibility of witnesses, and the like; or publication of such matters.[57] The overall standard under the first amendment should be one that would preserve the right of communication so far as possible but allow the court to protect the rights of the individual in situations demanding it. For such purposes a "reasonably tendency" test is probably too restrictive. The accommodation is perhaps better expressed in terms of a "clear and present danger" test or a "probable danger" test.[58] In any event the court is in a position to administer the standard with reasonable impartiality. The judge's own prestige or position is not under attack. The prosecution and the accused, or the parties in a civil case, represent opposing interests. The court is in the umpire's role, where it can decide with equal regard for both interests at stake.

On the other hand, in the situation where the court or the administration of justice is the object of the adverse expression, different considerations prevail. We are dealing here with the impact of expression upon the governmental organization itself, upon government officials in their professional capacity, not

56. To some extent the harm can be corrected by change of venue, care in the selection and instruction of the jury, and other similar safeguards. The factual assumption being made here, however, is that these devices, especially in an era of modern communication, are deemed inadequate and that other types of control are necessary to preserve the right of the individual.

57. For suggestions along these lines, see Donnelly & Goldfarb, *Contempt By Publication in the United States*, 24 MOD. L. REV. 239, 255 (1961).

58. This is not meant to imply a wholesale adoption of the clear and present danger test. See note 47 *supra*. But in this particular context, it appears to provide an adequate standard which can be administered without unduly repressive consequences.

with the impact upon private citizens called upon to participate in the governmental process in the capacity of amateurs. Here the harm feared is not so closely linked to the actual communication but lies more remotely in the influence of the communication on the subsequent conduct of the government itself. The injury is subject to control by regulation dealing directly with the feared harm. Here, also, the court becomes an interested party. It is unlikely, furthermore, that expression which does not affect the jurors, witnesses or parties will seriously prejudice the conduct of the proceeding by the judge. In spite of argument to the contrary, the judge must be presumed to possess a higher degree of fortitude in the face of public pressure than the ordinary juror, witness or party. In any event a presumption that the judge will not show courage or impartiality in the performance of his duty is hardly a satisfactory ground for restricting freedom of expression. The applicable rule here should be that governing criticism of government generally. The appropriate doctrine, as discussed shortly, would not seem to be one of accommodation but of full protection for the right of expression.

In practice, a reconciliation along these lines would not seriously interfere with freedom of expression. In this area the press has demonstrated both the inclination and the capacity to protect its rights. General social forces tend to favor the side of free expression. Criticism of the judicial process and the administration of law—the primary aspect of the social interest—would remain unimpaired. All in all the balance of forces at work would tend to produce a reasonable accommodation.

The decisions of the Supreme Court have in result not been inconsistent with the position urged. All the cases thus far decided have been of the second variety, involving criticism of the court or the administration of justice. In all, the right of expression has been upheld. Thus far the Court has not faced the issue in cases of the first type.[59]

3. Privacy

Exercise of the right to express oneself may also come into conflict with those interests of other individuals which may be grouped under the general heading of a right to privacy—this is the right of a person to be free at some point from intrusion by society into his intimate and personal affairs. Protection of this interest is essential to the maintenance of the proper balance between the life of a person as an individual and his life as a member of society. As the nature of modern society unfolds we come to appreciate more and more the feeling of Justice Brandeis that, "The right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men."[60]

59. The relevant Supreme Court decisions are Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Wood v. Georgia, 370 U.S. 375 (1962). *Cf.* Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950); also Stroble v. California, 343 U.S. 181 (1952). See generally Comment, *Free Speech Versus The Fair Trial in the English and American Law of Contempt by Publication*, 17 U. CHI. L. REV. 540 (1950).

60. Olmstead v. United States, 277 U.S. 438, 478 (1928). Generally on the right to privacy see Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

By what principles should the reconciliation of these two interests be effected? At first glance the problem looks formidable. A general formula attempting to draw a line between communication on matters of public interest and communication on matters of private interest is unsuitable.[61] But a strict use of the distinction between "expression" and "action," and an application of principles requiring accommodation as to time, place and manner of exercising the right of expression, furnish the basis of satisfactory doctrine. The application of these principles can be illustrated by considering the two main areas in which the problem of reconciliation has thus far arisen.

The first involves undesired publicity. In certain rather specific situations—such as where a photograph has been used without permission for commercial purposes or where a person living in seclusion has been, without justification, publicly identified with long past events of a damaging or disturbing nature—some courts or legislatures have allowed the individual whose privacy has been invaded to recover damages in a private suit.[62] Other circumstances in which a private suit for damages should be permitted could similarly be recognized. The considerations involved are very similar to those governing the problem of private defamation. The impact of the communication presses toward a classification as "action." And so long as the interest of privacy is genuine, the conditions of recovery clearly defined, and the remedy left to individual suit, it is most unlikely that the balance will be tipped too far toward restriction of expression.

The second area concerns communication which by its nature disturbs the quiet or repose of an individual or a neighborhood. Examples occur in the use of a sound truck in a residential area at night, or a public meeting in a section of a park set aside for rest or relaxation. In these situations, it should be noted, the restriction upon expression usually takes the form of a public prosecution rather than an individual right to take legal action. The applicable doctrine here should be one of fair accommodation of the two interests—communication and privacy. The restriction can be couched in terms of a limitation on time, geographical area, or decibels, or the allocation of space in the public park system. No element of prohibition or of regulation of the content of the communication is involved. Such restrictions can be reasonably objective, equally applicable to all those wishing to use the mode of communication, and relatively free of administrative abuse. Provided the courts insist affirmatively on a fair accommodation, rather than acquiescing in a merely plausible or even reasonable one, both interests can be satisfactorily reconciled. The Supreme Court's decisions in *Saia* and *Kovacs*, the sound truck cases, leave the problem

61. The distinction is not appropriate because communications on matters of public interest may easily interfere with a legitimate right to privacy—*e.g.*, cases involving sound trucks. While the distinction between public and private based on *subject matter* appears to me unworkable, it should not be confused with the distinction earlier adopted between public and private on the basis of the *interests affected* by a communication.

62. See I HARPER & JAMES, TORTS § 9.6 n.13 (1956).

in some uncertainty, but the results in those cases are not necessarily inconsistent with the views expressed here.[63]

In practical terms of maintaining an effective system of free expression, moreover, these issues yield rather readily to solution. Any society sincerely interested in protecting the right of privacy is hardly likely to be at the same time hostile to the right of free expression. Both interests tend to have the same friends and the same enemies. The chief danger is that the right of privacy will be used as a screen, by those not really interested in either interest, to infringe upon legitimate expression. This danger can be met if the courts actively insist upon a careful definition of a genuine right to privacy and upon a fair accommodation of the two interests.

In summary, the formulation of legal doctrines, under the first amendment, to reconcile the right to freedom of expression with the private interests of the individual does not appear to pose insuperable problems. In most cases the working rules can be stated with some objectivity. Institutional machinery is geared to deal with these issues on a relatively impartial basis. Social pressures are not so likely to distort the balance in favor of either interest; indeed, if anything, it is the private interest that is more likely to suffer. At this level there are, in short, built-in conditions which tend to preserve an appropriate balance.

C. *Reconciliation With Other Social Interests*

Most of the problems in defining the scope of freedom of expression under the first amendment concern the reconciliation of that interest with social interests. These issues are vastly more difficult to resolve than those in the private sphere. In this area the state is generally cast less in the role of impartial umpire and more in the role of interested agent, to a considerable extent engaged in making a decision in its own cause. This is because the social interests which compete, or may appear in the short run to compete, with the interest in freedom of expression are ones the state machinery is specifically designed and organized to protect. Maintenance of the social interest in internal order, external security, and the protection of property interests constitutes the day-to-day job of the governmental apparatus. Protection of freedom of expression is more abstract, more remote, less insistent. Furthermore, advancement of the competing social interest is more likely to be the direct concern of the groups which influence and control the government machinery. And the problem of self-control may be even more difficult in a government bureaucracy than in an individual.

Other similar factors operate in the same direction. Reconciliation of competing social interests raises broader issues, less clearly defined, less easily measured, and less manageable than the reconciliation of private interests. The forces in conflict are likewise more impersonal; moral principles of group conduct are

63. Saia v. New York, 334 U.S. 558 (1948); Kovacs v. Cooper, 336 U.S. 77 (1949). See also Martin v. Struthers, 319 U.S. 141 (1943) (upholding right to seek opportunity for communication by ringing doorbells).

not as easily learned or applied as in individual conduct. And it must be remembered that the expression which needs protection is normally that which is the unorthodox, the hated and the feared. Most of the powerful pressures of the majority are likely to be ranged against the interest of free expression.

In short the self-correcting forces that are at work in the reconciliation of freedom of expression with individual interests do not operate to the same extent where competing social interests are at stake. Here the legal doctrines necessary to maintain the intended balance must be more precisely and firmly formulated, and the judicial institutions charged with their administration more alert and vigorous.

1. Consensus and Efficiency

In attempting to enunciate specific doctrine we may commence with certain areas where the prior balance struck by the framers of the first amendment most clearly contemplates unqualified protection of the right to expression. These are where the social interest at issue is the promotion of national unity or consensus, the direction of gradual orderly change, or the maintenance of general efficiency in government operations. The power to restrict freedom of expression in order to promote these social interests is not often explicitly asserted. Nevertheless, such a claim is frequently implicit in much popular, and even legal, thinking on the subject. It is important, therefore, to bring these issues fully into the open. This discussion will also serve as a statement of the general principles governing the approach to the narrower, and more openly controversial, questions which follow.

Any society must, in order to function and survive, maintain within itself a certain unity. It requires sufficient agreement among its members not only to settle differences according to the rules and without resort to force, but to make the formal rules work in practice. No mechanism for government can by its mere existence hold a society together. This is especially true of a modern industrial community, with the interdependence of its parts and the complexities of its operations. Hence any society must seek to promote consensus among its members, and in this the machinery of the government will necessarily play an important role.

Nevertheless a democracy may not seek to promote its broad interest in consensus by means of restrictions on expression. If we accept the theory underlying freedom of expression, there is no fundamental conflict between the two interests. It would contradict the basic tenets of a democractic society to say that the greater the freedom of expression the less the area of agreement among its members. On the contrary, for reasons already stated, a healthy consensus is possible only where freedom of expression flourishes. Such freedom is essential to the whole process of legitimation of social decisions. And suppression not only is ineffective in promoting general agreement or stability, but hinders the process by engendering hostility, resentment, fear and other divisive forces. Furthermore, a principle of suppressing freedom of expression in any situation where the right is found to be outweighed by the general social interest in achieving consensus is administratively unworkable. The principle is not sus-

ceptible of any meaningful limitation. The difference between a society governed by such a principle and a totalitarian society becomes one of mere expediency.

The state may use its other powers to promote the social interest in consensus. It may control conduct other than expression; it may establish the economic, political and social conditions in which the necessary agreement is possible; it may engage in programs of education or propaganda, subject to limitations considered later. And institutions other than the state exist or may be devised to achieve the same ends. But if these measures are insufficient to maintain the necessary degree of national unity, the suppression of expression will not solve the problem except by destroying the democratic character of the society.

Society must also concern itself with the dynamics of change. While endeavoring to maintain a proper balance between stability and change, a society must be prepared to accept constant and substantial adjustment to new conditions. If there is one certain aspect of modern life, it is that no modern society can survive for long by merely preserving the status quo. A democratic society therefore has a vital interest in the process of orderly change, that is, in change which is accomplished by methods that are legitimate, at a rate of speed that allows satisfactory adjustment, and in a direction that advances the ultimate goals of the society.

This social interest, however, cannot justify restrictions upon expression. The principle is plain that there can be no interference with freedom of expression on the general ground that it will lead to social change, or change at the wrong rate or in the wrong direction. Here again there is no real issue of reconciling conflicting interests because there is no basic conflict. On the contrary, freedom of expression is one of the chief instruments for achieving orderly change. No objection can be made that the use of expression is an improper method of influencing change, for adjustment through public discussion is the essence of the democratic process. As for the rate of social change, the problem of modern society is more likely to be that the pace is too slow than that it is too rapid; the forces of stability and conformity tend to outweigh the forces of movement. In any event there is no known technique by which the rate of change can be regulated through restricting freedom of expression without destroying that freedom altogether. The same is true of the direction of change. Under democratic principles this must be determined by the sovereign people themselves, and that decision is possible only by the process of full and free discussion. There are risks in this procedure, as the theory of freedom of expression recognizes, but they are the risks which must be assumed by a democratic system.

There is likewise a social interest in the effective operation of government. This interest is of increasing importance as the functions of government expand and grow more intricate. Exercise of the right to expression may create dissatisfaction with governmental policies, institutions or officials, tend to add difficulties to the formulation or administration of law, or otherwise appear to impede the smooth operation of government. But this general social interest cannot be the basis for limiting expression. Again the conflict is more apparent

than real. In the long run, open criticism of the government's operations results in a more responsible, alert and fair administration, and hence in more effective government. And again any criterion of limitation which attempted to balance these two interests could only result in nullifying all freedom of expression.

Claims for the restriction of freedom of expression in order to promote consensus, alter the direction of change, or increase government efficiency have seldom been expressly made before the Supreme Court. The principal instance was in the flag salute cases, which also involved the problem of coercion of belief. The decision of the majority in the *Barnette* case seems plainly correct.[64]

The more difficult problems in reconciling the interest in freedom of expression with other social interests lie within narrower and more specific bounds. These issues, as they have emerged from the experience of our nation over the years and as they confront us today, must now be considered.

2. Preservation of Internal Order

Maintenance of law and order in a society, along with protection against external dangers, has traditionally constituted the chief purpose for which governments were instituted among men. The developing theory of freedom of expression was therefore necessarily and primarily concerned with the problem of reconciling the new right being asserted with the older interest in preserving internal order. This issue was indeed the main point of controversy in the evolution of the theory. And it may safely be assumed that the framers of the first amendment, in adopting the solution embodied in that provision, were making a deliberate choice on the basis of prolonged consideration and direct experience. If we are to give weight to this decision we must accept the basic legal doctrine that expression must be given full protection and only what may reasonably be called action be subject to restriction.

Broadly speaking, the problem is that exercise of the right of expression may cause, or tend to cause, conduct which violates existing law. The resulting conduct or potential conduct may be violent or nonviolent in character. And it may arise because those to whom the expression is communicated may be persuaded toward unlawful conduct in support of the expression or in opposition to it. But the social interest in maintaining internal order is concerned only with the ensuing unlawful conduct. In this context the expression, in itself and apart from such conduct, is of no social harm. If the theory of freedom of expression means anything, therefore, it requires that social control be directed toward the subsequent action. Hence the appropriate legal doctrine must be derived from the distinction between "expression" and "action."

This conclusion is reinforced by all our experience in attempting to effect a reconciliation by drawing a line at some other point. As already observed in the discussion of other theories of limitation, any formula for establishing a cut-off point between permissible and prohibited "expression" is doomed to failure. Such rules are hopelessly vague and unenforceable by judicial supervision.

64. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

They can give the lower federal or state courts no adequate guidance. A fortiori, prosecutors, police and other officials charged with maintaining internal order are left largely unrestrained. Even more devastating to freedom of expression, the individual seeking to exercise the right can not know where he stands. Pressures at the grass roots level, where the freedom is to be exercised, are intense, and the dynamics of administration push to extremes. Only a rule based on distinguishing "expression" from "action" can in practice preserve a system of freedom of expression.

The basic decision made by the framers that adequate protection can be afforded the interest in internal order through sanctions confined to the illegal action itself applies with even greater force to the problem in our times. The powers and resources of modern government, if exercised with skill and vigor, are sufficient for the task. The trend in modern society to greater acceptance of law and legal institutions, public attitudes toward the use of violence and illegal methods, the strength in this country of democratic procedures for resolving conflict, all create a favorable climate. A community which sincerely undertakes to maintain law and order without suppressing expression possesses the powers and techniques to accomplish that task. Where the attempt seems on the verge of failure, the remedy lies in other measures which will restore a basic consensus rather than in abandoning the system of freedom of expression.

It must be admitted that the problem of defining the area of freedom of expression when it appears to conflict with the social interest in internal order has been one of the most controversial in the whole field of individual rights. Strong objections have been raised that there are certain situations, some firmly established in the law, where the principle of allowing freedom of expression cannot afford adequate protection to the community interest in preserving internal order. It is submitted, however, that most of these difficulties can be resolved by careful formulation of the distinction between "expression" and "action." Thus, the use of speech inseparably locked with action should be treated as part of "action." An example is where the words are the equivalent of a spark in a powder keg resulting in instantaneous explosion, as in "fighting words" hurled in face-to-face encounter, or the classic cry of "fire" in the theater. Similarly, sheer threats of immediate physical harm delivered on a person-to-person basis, would fall into the category of "action." And "expression" which amounts to a signal for action, such as a command to shoot, can be conceived as by its very nature constituting "action."[65] In short, the line between "expression" and "action" can be drawn to accommodate the main situations in which it has been urged that "absolute" protection cannot be extended to freedom of expression at the expense of maintaining internal order. The crucial principle is that the issue be conceived and its resolution sought in terms of permitting "expression" and punishing "action."

One particular area which has seemed to some to raise a difficult doctrinal problem is the field of solicitation to crime. The law of solicitation evolved long before first amendment freedoms were recognized, and the courts have

65. See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

never squarely faced the problem of reconciling the two areas of law. It would seem, however, that the "expression"—"action" dichotomy conveys the basic distinction. The problem is, indeed, no different from that involving the use of speech generally in the commission of crimes of action. Most crimes—certainly those in which more than one person participates—involve the use of speech or other communication. Where the communication is an integral part of a course of criminal action, it is treated as action and receives no protection under the first amendment. Solicitation to crime is similar conduct, but in a situation where for some reason the contemplated crime does not take place. Solicitation involves a hiring or partnership arrangement, designed to accomplish a specific action in violation of law, where the communication is an essential link in a direct chain leading to criminal action, though the action may have been interrupted. In short, the person charged with solicitation must, in a direct sense, have been a participant in an abortive crime of action. Thus the crime of criminal solicitation may be seen as a particular instance of the more general category of criminal attempts. Here also, the applicable legal doctrine undertakes to draw the line between "expression" and "action." The fact that issues of this nature rarely arise indicates that establishing the division between free expression and solicitation to crime has not created a serious problem.[66]

The problem of reconciling freedom of expression with internal order has arisen in two main types of situations. One is where the threat to order is local in nature and relatively isolated. This is the problem of maintaining order in meetings, parades, demonstrations and the like. The other is where the anticipated danger affects the country on the broader scale, arises out of organization activity, and may involve a whole movement. This problem is usually considered one of "national security."

Community attempts to deal with the local problem often give rise to the harder cases. The danger of internal disorder may be more immediate and the relationship of "expression" to "action" more direct. The appropriate response of the community, however, should lie in affording adequate police protection. This was the reasoning of the Supreme Court in *Cooper v. Aaron*, where the constitutional right of equal protection was threatened by public disorder. "Thus law and order are not here to be preserved," the Court said, "by depriving the Negro children of their constitutional rights."[67] The principle is similarly applicable to the constitutional right of free expression. Where the problem genuinely exceeds these bounds the ultimate recourse of the community is in martial law. This involves a substitution of military for civilian procedures and the normal rules of the democratic process are no longer applicable. The question of when such an emergency may be declared, how long it may be con-

66. On solicitation and other "inchoate" crimes, see Wechsler, Jones, & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 COLUM. L. REV. 571, 957 (1961). For a suggestion of the distinction based on private versus public expression, see the dissent in Musser v. Utah, 333 U.S. 95, 98 (1948).

67. Cooper v. Aaron, 358 U.S. 1 (1958). For an elaboration of this proposition see Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1437-38 (1962).

tinued, and who may make these decisions are critical issues in any theory of freedom of expression. They can not, however, be dealt with here.

As to the broader problem of "national security," the doctrine of drawing the line between "expression" and "action" is even more clearly appropriate. The availability of other legislation protecting society against the use of anti-democratic methods makes such a distinction workable. The increased reliance upon an apparatus of secret police, informers, and other paraphernalia of ideological suppression; and the impact of suppression upon the society generally, render adherence to the basic principle more imperative. Certain special problems, however, require comment.

Exercise of the right to expression through the medium of an association may pose greater dangers to internal order than where the expression emanates from unorganized individuals. Indeed, it is only in comparatively recent times that political or other associations have been tolerated at all, even in emerging democratic societies. It is now recognized, however, that the right of association is essential to effective expression, and the greater political and social stability of our society not only enables us to accept but to encourage it. The concept of freedom of expression presently extends to a right of association, that is, a right to form and join organizations for the advancement of particular views and to carry on all the normal activities of such associations.

In general the same principles of reconciliation should apply to associational expression. The line must be drawn between expression and other conduct. But safeguarding the social interest in order may require increased attention to conduct which is in the nature of "preparation" for illegal action. Thus classes in the use of sabotage or street fighting, the wearing of uniforms, or similar paramilitary training would fall within the area of "action" rather than "expression."

Two additional principles of prime significance may be stated with respect to associational expression. One relates to the situation where an organization may be engaging in illegal conduct and at the same time seek to assert a right also to engage in legal expression. In the case of an individual, the answer is clear. He is punishable for illegal conduct but otherwise remains free to exercise his legal right to expression. The same rule should apply to associations. The first principle, therefore, is that where an association engages in both legitimate and illegitimate activity, the two must be separated; the illegal conduct may be prohibited, but the legal activity, including expression, should be permitted. A corollary principle is that illegitimate conduct by certain members of an association ought not to be ground for restricting expression on the part of other members or sympathizers.

The Supreme Court has not, of course, adhered to the doctrines here urged for reconciling freedom of expression with internal order. In the *Feiner* case a majority cut off expression in a local situation at a very early point, allowing an extreme degree of discretion to police officers in suppressing speech.[68] In the Smith Act cases a majority of the Court in the interest of national security

68. Feiner v. New York, 340 U.S. 315 (1951). *Cf.* Kunz v. New York, 340 U.S. 290 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949).

employed a watered-down version of the clear-and-present danger test to punish Communist Party members who were found to "advocate principles of action" intended to lead to overthrow of the government by force and violence, as distinguished from "advocating ideas."[69] In the McCarran Act case a majority upheld requirements of disclosure, amounting in practice to the elimination of open activities by the Communist Party, upon the basis of standards which were not even confined to the use or advocacy of force or violence or other illegal action.[70] In all these cases a minority in dissent contended for principles more appropriate for preserving a vital system of free expression.

3. Safeguarding External Security

Another major social interest, with which freedom of expression may sometimes be felt to conflict, is the interest of the society in external security. In a broad sense this social interest embraces all relations between the society and other societies or nations. Those aspects of the problem which relate to war and preparation for war, however, have been the subject of most controversy and will be considered first.

In attempting to formulate the legal doctrine by which the interest in freedom of expression must be reconciled with the social interest in carrying on a war or maintaining an effective defense, we start with the general principle already enunciated with respect to internal order—that expression must be protected and only other conduct prohibited. Full and open discussion of matters relating to war and defense are, if anything, more vital to the life of a democracy than in any other area. And the reasons for not attempting to draw a line cutting off expression at any point short of overt action are, generally speaking, equally persuasive in this sphere. Accepting this prior balance, it is clear that full freedom of expression must be allowed with respect to such matters as general opposition to a war, criticism of war or defense policies, and discussion of particular measures whether related to direct military or supporting action.

Nevertheless, in the sphere of war and defense an important factor originating outside the area of free expression must be recognized: military operations cannot be conducted strictly in accordance with democratic principles. A military organization is not constructed along democratic lines and military activity cannot be governed by democratic procedures. To a certain extent, at least, the military sector of a society must function outside the realm of democratic principles, including the principle of freedom of expression. This qualification is in turn qualified by the principle that in a democratic society the military must remain under the ultimate control of civilian authority. Yet at some point the nondemocratic nature of military operations must be recognized; the problem is to fit this sector of society into the basic democratic framework.

69. Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961).

70. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

Some of the points where conduct in the military sphere falls outside the area of free expression are reasonably clear. Certainly, members of the armed forces, at least when operating in that capacity, can be restricted in their right to open discussion. Similarly, the social interest in external security would justify limitations on the disclosure of military operations in wartime, or certain other forms of military censorship; prohibitions against espionage or the disclosure of military secrets; restrictions on access to military installations; and punishment of direct efforts to create mutiny or insubordination in the armed forces. The problem is to draw the line at that point where the requirements of the military sector end and civilian principles again come into play.[71]

Apart from war and defense, the social interest in external security may extend to other aspects of the conduct of foreign affairs. Here also a new element, likewise beyond the realm of freedom of expression, enters the picture. We are dealing with the relations of one society or government to another, not with relations between members of a single society or such members and their government. This makes it necessary to consider the means by which the government can maintain control over its relations with foreign nations, for instance in the making and enforcement of international commitments. Moreover, the inhabitants or government of another nation are not part of our society; they are not subject to our laws, institutions, customs or loyalties; and they do not share the rights or obligations of our citizens. Hence the problem of communicating with or receiving communications from other societies may raise novel questions.

In certain situations these factors pose no problems in application of the basic theory. Such considerations would not operate to prevent criticism of the general conduct of foreign affairs. Nor would they limit the general right of members of our society to communicate with members of another nation, to receive communications from such sources, or to travel abroad (apart from limitations based on military requirements or the need to prevent escape from justice). But they would justify a prohibition against espionage or the disclosure of government secrets to foreign governments or interests. And they would warrant limitation on the right of individuals in this country to conduct negotiations with a foreign government, or restrictions on the activities of paid agents of a foreign power. In other situations more difficult problems might arise. The essential point here also is that the legal judgment turns upon defin-

71. The Supreme Court's decisions in the World War I period, when first amendment doctrine was in its infancy, undoubtedly went too far in upholding restrictions on expression. See Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920); United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407 (1921); Gilbert v. Minnesota, 254 U.S. 325 (1920). In the World War II period the Court did not squarely pass on the issues. See Hartzell v. United States, 322 U.S. 680 (1944); Keegan v. United States, 325 U.S. 478 (1945); Gara v. United States, 178 F.2d 38 (6th Cir. 1949), *aff'd by an equally divided court*, 340 U.S. 857 (1950).

ing the proper area of freedom of expression, as embodied in the basic theory and enacted into fundamental law by the first amendment, and distinguishing these limited sectors of social activity which are dominated by extraneous elements.[72]

4. Interests Sought to be Protected by Restrictions on Obscene Publications

There is no clear agreement as to what social interests are sought to be protected by the laws restricting expression on grounds of obscenity. The main justifications advanced for such legislation, however, would seem to fall into the following categories: (1) that the expression has an adverse moral impact, apart from any effect upon overt behavior; (2) that the expression may stimulate or induce subsequent conduct in violation of law; (3) that the expression may produce adverse effects on personality and attitudes which in the long run lead to illegal behavior; (4) that the expression has a shock effect, of an emotionally disturbing nature; and (5) that the expression has especially adverse effects, of the sort described in the previous categories, upon children, who are intellectually and emotionally immature.[73]

Most of the factual assumptions underlying these justifications are unsupported by empirical evidence. According to a recent survey, such evidence as is available indicates that expression of an erotic nature does result in "heightened sexual arousal" in some persons under some circumstances, and is for some persons "a distinctly adverse experience." But there is virtually no evidence as to how or whether these responses "affect overt behavior" or "attitudes governing behavior and mental health."[74] The ultimate resolution of the obscenity issue will undoubtedly be influenced by the development of a body of scientific knowledge pertaining to these matters.

The prevailing legal doctrine is that enunciated by the majority of the Supreme Court in the *Roth* case. The principle there stated is (1) "obscenity is not within the area of constitutionally protected speech"; and (2) the test for determining obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole

72. The ruling of the majority of the Supreme Court in the McCarran Act registration case, based on a broad construction of "direction, domination and control by a foreign government," pushes the line much too far into the domain of free expression. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961). But the Court's decision in the Foreign Agents Registration case is not in conflict with the doctrine proposed here. Viereck v. United States, 318 U.S. 236 (1943). The Court has not yet passed on issues of constitutional limitation in passport cases. See Kent v. Dulles, 357 U.S. 116 (1958); *but cf.* Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959).

73. Recent literature discussing the obscenity problem includes: Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960); Kalven, *The Metaphysics of the Law of Obscenity*, THE SUPREME COURT REVIEW 1 (1960); PAUL & SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL (1961); Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962).

74. See Cairns, Paul & Wishner, *supra* note 73, at 1031-34.

appeals to prurient interest."[75] The rule of the *Roth* case is open to criticism on a number of grounds, among others that the standard of "appeal to prurient interest" is so vague as not to afford any precise line of demarcation. Other efforts to draft a clear formula, distinguishing between protected and unprotected speech in terms of obscenity, have been equally unsuccessful. The practical result of the recent Supreme Court decisions has been, as nearly as it can be reduced to words, that only "hard core pornography" is likely to be found obscene.[76]

If one approaches the problem in the light of the considerations suggested here, it would appear that the first three justifications advanced for the obscenity laws are incompatible with the basic theory of freedom of expression as incorporated in the first amendment. The fact that expression influences moral beliefs and attitudes, apart from any impact on behavior, is clearly no ground for restriction. Most expression is intended to and does have this result.[77] Similarly, the argument that obscene expression stimulates or induces subsequent illegal conduct, even if true, falls before the fundamental proposition that society must deal with the illegal action directly and may not use restriction of expression as a means of control. Again, many forms of expression would have a similar effect in influencing subsequent conduct. Nor is there anything in the nature of illegal conduct induced by obscene expression which would differentiate it from any other illegal conduct or require application of a different rule. A fortiori, the fact that the expression influences attitudes which in the long run influence behavior is unacceptable as a basis of restriction. Strict adherence to the distinction between "expression" and "action" which underlies the whole theory of freedom of expression is even more important if one takes into consideration the conditions under which obscenity restrictions would operate. No one has yet conceived a formula for defining "obscenity" which can be applied with any precision, and the abuses of all systems of literary censorship are notorious. No general restriction on expression in terms of "obscenity" can, therefore, be reconciled with the first amendment.

On the other hand, certain aspects of the "shock effect" of erotic expression present different considerations. Where a shock effect is produced by forcing an "obscene" communication upon a person contrary to his wishes, the issue is somewhat similar to that involved in private defamation. The harm is direct, immediate and not controllable by regulating subsequent action. The conduct can realistically be considered an "assault" on the other person, and hence placed within the category of "action." Issues of this sort arise, of course, only in limited situations, such as where the communication is displayed publicly on a billboard, or sent into a private home through the mail. Regulations can be devised to deal with this matter that do not create serious administrative

75. Roth v. United States, 354 U.S. 476, 485, 489 (1957); *cf.* Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).

76. For analysis of the Supreme Court decisions following the *Roth* case, see Lockhart & McClure, *supra* note 73. See also Manual Enterprises, Inc. v. Day, *supra* note 75.

77. The Supreme Court took this position in Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959).

problems. Under the circumstances restriction of communications of this nature would not be inconsistent with the first amendment.[78]

Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults. Serious administrative difficulties arise, of course, in attempting to frame restrictions which affect only children, and do not impinge upon the rights of others.[79] But to the extent that these practical problems can be solved, the first amendment would not seem to preclude controls over erotic communication addressed to children.

5. Other Social Interests Sought to be Protected By Direct Restrictions Upon Expression

Apart from the situations already discussed, there would appear to be very few instances where even a plausible argument can be made that protection of a social interest requires a direct limitation on expression. So far as past experience indicates, it is hardly disputed that all such interests can be adequately safeguarded by restrictions on the conduct which is opposed to the interest affected, rather than upon the expression which may create or lead to the offending conduct. Among the isolated situations where such a problem has arisen, the case of the city ordinance which undertakes to prevent littering of the streets by forbidding the distribution of handbills may serve as an illustration. Here it is entirely clear that the remedy for the social evil is a direct prohibition against littering the streets rather than a limitation on circulation of literature. Thus the general legal doctrine ensuring full protection to expression is applicable to other kinds of social interests.[80]

Two types of special cases require brief mention. One concerns those relatively rare situations where expression and the action sought to be regulated are inseparable. The outstanding examples are picketing, which may be both a form of expression and an exercise of economic pressure; and speech by employers which, through implicit threat of economic retaliation, impairs the right of employees to self-organization and collective bargaining. In such situations, the communication being in and of itself coercive, the conduct is appropriately classified as "action" rather than "expression."[81]

78. It might be suggested that the Supreme Court, in limiting the concept of obscenity to "hard core pornography," is in effect employing a "shock effect" test, but one based on general community standards and applicable to willing as well as unwilling recipients.

79. See Butler v. Michigan, 352 U.S. 380 (1957).

80. See Lovell v. City of Griffin, 303 U.S. 444 (1938); *cf.* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

81. See, on picketing, the line of cases culminating in Int'l Bhd. of Teamsters Union v. Vogt, 354 U.S. 284 (1957); on employer free speech, NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941).

The other special situation is where the conflict between expression and the other social interest is essentially one of physical incompatibility, as where a parade or meeting is held on a street or in a park which is also used for other purposes. The problem here is the regulation of the time, place, or manner of expression in order to make a proper allocation of limited physical facilities. The legal doctrines would be the same as those applicable to other cases of traffic control, discussed below.

6. Social Interests Sought To Be Protected by Measures Which Also Affect Freedom of Expression

The problems of reconciliation thus far discussed have involved governmental regulations explicitly directed at control of expression. But the expression may be curtailed also by measures which are directed, at least ostensibly, at other forms of activity, but which have a "secondary," "indirect" or "incidental" effect upon expression. Such measures include various types of tax and economic regulations, the imposition of political qualifications for obtaining government employment or other benefits or privileges, the activities of legislative investigating committees, and political restrictions on the rights of aliens. The fact that these forms of government action do not directly prohibit or regulate expression does not mean that they are of less significance in the functioning of a system of free expression. Quite the contrary, in the period since World War II the impact of such measures upon freedom of expression has probably been as serious as, or more serious than, the impact of explicit limitations. Unfortunately the principles for reconciling the social interest in achieving the goals sought by these measures with the maintenance of free expression have received relatively little attention.

Ever since the *Douds* case, a majority of the Supreme Court has employed the ad hoc balancing test as the formula for solving this problem.[82] For reasons already stated, the test is defective in theory and appears to have failed to afford adequate protection to freedom of expression in practice. Is it possible, then, to frame a more satisfactory interpretation of the first amendment in this area, one that will be less open-ended and that will permit the courts to function more like judicial institutions?

In attempting to frame such legal doctrine we start again with the basic principle—the prior decision on balancing incorporated in the first amendment—that the state may not seek to achieve control over action by regulation of expression. The main problem here, to repeat, is one of defining the area of "expression." In addition, another element must now be considered. By hypothesis the regulation imposed is, taken by itself, a legitimate one, aimed directly at control of "action." The question is its secondary impact upon an admitted area of "expression." This is essentially a problem of determining when the regulation at issue has an effect upon expression which constitutes "abridging" within the meaning of the first amendment. In other words the courts must now undertake to define and give content to the concept of "abridg-

82. See Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1426 (1962).

ing." This judgment, like the judgment in defining "expression," must be made in light of the affirmative theory underlying freedom of expression and the various conditions essential to maintaining a workable system.

Formulation of specific legal doctrine along these lines requires consideration of the separate types of situations in which the issue arises.

(a) Taxation and Economic Regulation

Regular tax measures, economic regulations, social welfare legislation and similar provisions may, of course, have some effect upon freedom of expression when applied to persons or organizations engaged in various forms of communication. But where the burden is the same as that borne by others engaged in different forms of activity, the similar impact on expression seems clearly insufficient to constitute an "abridging" of freedom of expression. Hence a general corporate tax, wage and hour or collective bargaining legislation, factory laws and the like are as applicable to a corporation engaged in newspaper publishing as to other business organizations.[83] On the other hand, the use of such measures as a sanction to diminish the volume of expression or control its content would clearly be as impermissible an "abridgment" as direct criminal prohibitions. The line may sometimes be difficult to draw, the more so as the scope of the regulation is narrowed.

Two principles for delineating the bounds of "abridging" may be stated. First, as a general proposition the validity of the measure may be tested by the rule that it must be equally applicable to a substantially larger group than that engaged in expression. Thus a special tax on the press alone, or a tax exemption available only to those with particular political views or associations, would not be permitted.[84] Second, neither the substantive nor procedural provisions of the measure, even though framed in general terms, may place any substantial burden on expression because of their peculiar impact in that area. Thus the enforcement of a tax or corporate registration statute by requiring disclosure of membership in an association, where such disclosure would substantially impair freedom of expression, should be found to violate first amendment protection.[85]

One special problem in this area should be noted. Since children cannot, at least in some respects, be considered as within the framework of a system of free expression, economic regulations controlling the conduct of children, such as a law regulating the employment of children, which operated to prevent them from distributing literature in the streets, would not necessarily infringe the principles of freedom of expression.[86]

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83. See Associated Press v. NLRB, 301 U.S. 103 (1937).

84. See Grosjean v. American Press Co., 297 U.S. 233 (1936); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Speiser v. Randall, 357 U.S. 513 (1958); Cammarano v. United States, 358 U.S. 498 (1959).

85. See NAACP v. Alabama, 357 U.S. 449 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960).

86. See Prince v. Massachusetts, 321 U.S. 158 (1944).

So far as concrete problems of this nature have arisen, the application of these doctrines would appear entirely workable. Indeed, in the results reached, the Supreme Court decisions in this area have been wholly consistent with them.[87]

(b) Qualifications for Benefits or Privileges or Holding Positions

One of the major developments of recent years has been the increasing volume of government regulation which requires persons, as a condition to obtaining certain benefits or privileges or holding certain positions, to meet qualifications based on political views or associations. Requirements of this nature have been imposed in many fields, including the right to appear on the ballot, to hold public office, to obtain public employment, to practice law, to be granted various kinds of licenses, to receive welfare benefits, to live in publicly assisted housing, to travel abroad, and to hold office in a labor organization. The purpose of these restrictions, in theory, is not to penalize past political expression, but to prevent future conduct by eliminating those who might in the future engage in activities damaging to the social interest involved in the basic regulation. Thus in the field of government employment—an area where requirements of this nature are widespread—the loyalty programs are designed to weed out in advance those persons whose prior expression of political views is thought to indicate a greater likelihood that they would engage in treason, espionage, sabotage or other conduct detrimental to government service.

Reconciliation of the interest in freedom of expression with the social interest sought to be protected by these preventive measures raises issues essentially the same as where direct restriction is used to safeguard the social interest in internal order. Without attempting at this point to examine the concrete issues involved in particular regulations, the general principle may be stated that use of qualifications based upon exercise of the right of expression is wholly incompatible with a system of free expression, and that the other social interests at stake can be adequately protected by prohibition of the conduct rather than the expression. Whether actually intended or not, the imposition of such qualifications operates as a penalty—a severe and pervasive one—upon free expression. The administration of such restrictions—involving searching without limits or logic into every phase of a person's beliefs, opinions and associations; the imputation to individuals of the views of others with whom he associates; the creation of a far-reaching apparatus of investigation and enforcement; the stimulation of an atmosphere of fear and hysteria—is particularly destructive. The use of beliefs, opinions and associations as a guide to future improper conduct, where relevant at all, is of minimal value. Employment of such qualifications, even on a limited scale, seriously "abridges" freedom of expression. Widespread use under conditions of modern life must result in virtual annihilation of any real freedom of expression intended to be protected by the first amendment.

87. See cases cited in notes 83-86 *supra*.

Two special situations, however, do not fall within the above doctrine. The military sector of our national life, as previously noted, must operate to some degree outside the system of free expression. This may justify certain qualifications for those who have access to important secret military information. And, in government employment, a relatively few high posts demanding the exercise of policy discretion may require incumbents who, in order to carry on the functions of the office, must adhere to certain views. To demand the necessary qualifications, under these circumstances, does not "abridge" the freedom of expression of persons holding other opinions. But these areas should be narrowly and carefully defined.

The Supreme Court does not accept these doctrines, a majority applying the ad hoc balancing test. In this area the first amendment has afforded small protection to freedom of expression.[88]

(c) Legislative Investigating Committees

Operations of legislative investigating committees during the last several decades have raised issues which have come to be of the first importance. The social interest here is that the legislature obtain the information necessary to carry out its function of considering and enacting legislation and to perform its other duties. The value of this process of legislative fact-finding cannot be ignored. Yet, in pursuit of that objective, legislative investigating committees have seriously curtailed freedom of expression in the United States. Of this fact there can be no doubt. But the problem of reconciling competing interests in this area has proved to be particularly difficult. The investigating process, by its very nature, does not readily lend itself to limitation. No one can say with certainty how much information is necessary, what line of investigation may lead to valuable information, where the boundaries of relevance lie. Moreover, institutional techniques available for effecting an accommodation between opposing interests are by no means satisfactory. Thus the judiciary is naturally reluctant, and politically at a disadvantage, in attempting to limit legislative action in this area. And under present procedures the witness must guess, at peril of prison if he errs, at what point his right to decline to answer arises.

For these and other reasons the development of principles of reconciliation has been slow and inadequate. The rule presently prevailing in court decisions is that an ad hoc balance must be struck between the interest in freedom of speech and the interest of the legislature in securing the information it seeks. But again this doctrine has plainly not solved the problem. Another principle

88. The leading case, as previously noted, is American Communications Ass'n v. Douds, 339 U.S. 382 (1950). See also Konigsberg v. State Bar, 366 U.S. 36 (1961); *In re* Anastaplo, 366 U.S. 82 (1961); Flemming v. Nestor, 363 U.S. 603 (1960); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952); Lerner v. Casey, 357 U.S. 468 (1958); Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); *cf.* Gerende v. Board of Supervisors, 341 U.S. 56 (1951); Wieman v. Updegraff, 344 U.S. 183 (1952); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Shelton v. Tucker, 364 U.S. 479 (1960); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961).

advanced has been that the legislature should have no authority to expose, for the sake of exposure, without reference to a legislative purpose. But the line here is most difficult to determine, is readily evaded, and is not of much help to courts or witnesses. A third test—that the investigation may not invade the area of expression protected against direct state interference—has run into the claim that it may be necessary to overstep the boundary in order to determine where the boundary is, and has been of limited utility where the protected area of expression is defined in loose terms of clear and present danger or balancing interests.

On the basis of our previous analysis, however, legal doctrines may be formulated which promise some degree of certainty and a reasonable accommodation. In the first place the process of legislative investigation, under certain circumstances, clearly constitutes an "abridgment" of freedom of speech. This is obviously true where the inquiry is directed into the opinions, utterances or associations of a hated or highly unpopular minority. The harassment involved in being summoned before a legislative committee, the economic and social sanctions which follow the forced disclosure of views or associational ties, the atmosphere of fear and hysteria engendered by dramatic revelations of the committee, the creation of a permanent bureaucracy devoted to investigating opinions and organizations, and similar factors, seriously impair full and open discussion of controversial issues. The fact that this curtailment of free expression occurs has been widely recognized. The legal conclusion that it constitutes an "abridgment" within the meaning of the first amendment follows from the considerations set forth above. There may be other circumstances, of course, where a legislative inquiry concerning opinion does not operate as an "abridgment." For example, questions put to the president of a large corporation concerning an address in which he discussed a pending tax proposal would hardly fall within that classification. The problem of differentiating may be troublesome at times, but certainly it is not beyond the capacity of a court to determine.

Secondly, the principle that the government may not seek to achieve its legitimate objectives in the area of "action" through methods abridging "expression" fully applies to legislative inquiries. The prior balance struck by the first amendment precludes such intrusion. In theory there is no reason why an exception to the basic principle should be made for a legislative committee; indeed such a committee is less likely to represent the public need or desires than when the legislature acts as a whole in passing a statute. In practice, experience tends to show that the fact-finding necessary for legislative purposes can be achieved by voluntary testimony or compulsory testimony more closely related to the area in which the legislature may enact legislation.

Hence similar legal doctrines ought to apply here as in other situations of legislative action having a "secondary" or "indirect" effect upon freedom of expression. Briefly stated they might be:

(1) A legislative committee should not be permitted to inquire into conduct previously defined as "expression" under circumstances where such inquiry

would realistically constitute an "abridgment." It may investigate "action," or it may investigate "expression" where no "abridgment" occurs, subject to other rules such as the privilege against self-incrimination. The rule is a workable one if the distinction between "expression" and "action" is maintained. It would follow that a legislative committee should not intrude in an area of "expression" in order to seek leads for an inquiry into conduct within its permitted sphere of investigation.

(2) Expression in the form of associational activity should be protected by doctrines similar to those discussed above in connection with reconciling freedom of expression and internal order. Thus the fact that an association is engaged in certain forms of "action" ought not to permit inquiry into its conduct in the area of "expression." The two forms of conduct should be kept separate. Likewise the conduct of one member constituting "action" ought not to be ground for investigating the conduct of another member in the field of "expression."

We may, by way of illustration, apply these rules to the most controversial issue in the operation of legislative committees—whether the committee may compel a witness to answer whether he is "a member of the Communist Party." Such an inquiry clearly constitutes an "abridgment." It also invades the area of "expression." For the Communist Party, whatever else it may be doing, engages in various forms of legitimate expression; and the question put, as Dr. Meiklejohn has pointed out, is a "complex" one, embracing many different kinds of conduct, some of which are protected as an exercise of the right to expression.[89] The committee may properly inquire into alleged activities of the witness or the Communist Party which constitute "action," including espionage, sabotage, violence, preparations for violence, and the like. But it should not, by lumping the different forms of conduct together in one question, abridge freedom of expression.

It may be added that the foregoing legal doctrines should be supplemented by certain legislative reforms for improving the institutional structure. These would include such requirements as a definite mandate to the committee from the parent body, certain safeguards for witnesses, and a mode of judicial review which is less risky than a citation for contempt.

Once again the Supreme Court decisions do not adhere to these principles. A majority has held that a state legislative committee may not inquire into the associations of a witness in the Progressive Party. But it has consistently upheld broad inquiries into membership in the Communist Party and into "Communist activities." In general, as a protection to freedom of expression against the conduct of legislative committees the first amendment has been of very limited usefulness.[90]

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89. Meiklejohn, *The Barenblatt Opinion*, 27 U. CHI. L. REV. 329, 338-39 (1960).

90. See Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961). *Cf.* United States v. Rumely, 345 U.S. 41 (1953); Watkins v. United States, 354 U.S. 178 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

(d) Aliens

Another area where restrictions on expression have played a prominent role is in the treatment of aliens. Severe limitations have been imposed upon aliens through laws and regulations dealing with their deportation, naturalization, and denaturalization. The social interests sought to be achieved by these restrictions have never been clearly defined. Presumably the objective has been to promote national unity and to prevent violation of law.

The basic theory of freedom of expression would seem clearly to preclude any special restriction upon freedom of expression by aliens. The right of expression extends to all individuals as members of a society, regardless of whether they are born into it, formally accepted as members, or are members by virtue of residence alone. Realization of the social values of free expression requires, also, that all members of the society have and exercise the right. Actually non-citizens have made and constantly make vital contributions to our national life. Finally, limitation on aliens in the area of expression necessarily restricts the rights of citizens. Not only does it curtail the right of the citizen to hear, but it seriously deters the citizen from exercising his own right of expression. Reconciliation of competing interests is hence no different in the case of aliens than for any other members of the society.[91]

D. *Government Action Designed to Facilitate Operation of the System*

A theory of freedom of expression must deal not only with the powers of the state to restrict the right of expression but also with the obligations of the state to protect it and, in some instances, to encourage it. To use the government itself—the traditional enemy of freedom of expression—as an instrument for promoting freedom of expression and eliminating obstacles to its proper functioning, calls for unprecedented imagination and discipline.

The problems arise in four major areas: (1) traffic controls; (2) purification of the democratic process; (3) protection of the free functioning of the system against undue interference from private (non-governmental) sources; and (4) affirmative measures which the government may take to increase the effective operation of the system by encouraging greater use and diversity of expression.

1. Traffic Controls

The first problem involves the physical context in which expression takes place. Two types of situations have arisen: those where it is necessary to reconcile the interests of two or more persons or groups who seek to express their views at the same time or place; and those where exercise of the right of expression may conflict with the desire of others to use the same facilities for other forms of activity. Neither situation involves regulation of the content of expression. These are essentially questions of traffic control, and they are

91. The Supreme Court has notoriously not followed these principles. See Galvan v. Press, 347 U.S. 522 (1954). The principles do not fully apply, of course, to the admission of aliens, since they are not yet members of our society. Here the first amendment would seem to guarantee no protection. The policy which should be adopted on admission of aliens is another matter.

resolvable through the development of legal doctrine giving content to the meaning of "abridge."

The first kind of traffic control occurs where two or more groups desire to hold a parade, demonstration or meeting in the same place, or to use the same public buildings or other public facilities for communication. The issue here is not one of reconciling the right to freedom of expression with other social interests, but rather one of devising a method of public control in order to maintain orderly expression and thereby promote freedom of expression. The traditional tests of "absolute" freedom, clear and present danger, or balancing different kinds of social interests are irrelevant. But the substantive principle is clear. It is simply the requirement that the system of control afford equality of treatment as between individuals or groups and allow no discrimination on the basis of the content of the expression. The application of this principle presents real difficulties only where the physical facilities are seriously limited in relation to demand, such as in the field of radio and television. Here the question of equality of treatment may involve complex factors, and the issue of control of content re-enters. The resolution of this problem requires consideration of the specific facts in individual situations and will not be attempted here.

Protection against abuse in the administration of the traffic system may raise troublesome questions. But potentially adequate principles of control are available to the courts. The main ones are (1) that the standards be specifically and objectively formulated, a requirement also enforceable under the rule against vagueness or the rule against excessive delegation of power; (2) that the procedures be fair, enforceable also under doctrines of due process; and (3) that effective judicial supervision be afforded, enforceable under general doctrines of judicial review.

The second form of traffic regulation becomes necessary in situations where a group wishes to engage in some form of communication at a place which will interfere with the normal flow of traffic or the activities of other persons engaged in other affairs; or where a group wishes to use a public building ordinarily devoted to other purposes. The standards just stated are applicable here. But one addition is necessary: the traffic system must provide for a reasonable accommodation of opposing interests. This is, of course, a balancing test. Since resolution of the problem does not involve total foreclosure of either interest, however, but merely adjustments of time and place, it requires consideration of much more precise and limited factors. Hence, in this context, a balancing test seems manageable.

The Supreme Court decisions in this area, while not clearly articulating these principles, have in substance adhered to them.[92]

92. For application of the principle of non-discrimination, see Niemotko v. Maryland, 340 U.S. 268 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953). On the rule against vagueness, see Cantwell v. Connecticut, 310 U.S. 296 (1940); Kunz v. New York, 340 U.S. 290 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958). On accommodation with those using the same facilities for other purposes, see Hague v. CIO, 307 U.S. 496 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941). All the above cases, of course, allow judicial review. But in Poulos v. New Hampshire, 345 U.S. 395 (1953), a majority of the Court imposed severe limitations upon the practical use of judicial review.

2. Purification of the Democratic Process

Problems of reconciliation have likewise arisen where the state seeks to impose restrictions upon expression designed to purify the democratic process by eliminating corruption, fraud, misrepresentation, appeals to hatred and similar forms of expression. The chief restrictions of this nature have been corrupt practices legislation, lobbying legislation, registration and disclosure requirements, and group libel laws. The purpose of such measures, at least in theory, is to promote the healthier and more efficient operation of a system of free expression. And the issue posed, again at least in theory, is not the reconciliation of freedom of expression with another kind of interest but the reconciliation of opposing interests within the system of free expression itself. Yet the problems are far more difficult than those arising in connection with the physical ordering of expression. Here the regulation often seeks to deal with the content of expression and, unless carefully circumscribed, is more likely to impair than promote open discussion.

In the light of prior discussion of the theory and administration of a system of free expression, the following proposals would appear to provide suitable principles of reconciliation:

(1) In general, purification through restrictions on the manner or content of expression is an "abridgment" and hence invalid. This is true for the same reasons that limitations framed in terms of "social value" or "truth" are not generally acceptable criteria. It is the function of the individual, not the government, to sift the true from the false, the relevant from the irrelevant, the rational from the appeal to prejudice. The standards used in purifying regulations are necessarily vague and in practice subject to misuse for partisan purposes. Although there is considerable appeal in the ideal of conducting all expression on a clean, fair and rational level, such an ideal is not attainable in the actual conduct of human affairs. The result of such broad restrictions can only be the suppression of unorthodox, unpopular, or minority expression.

(2) One cannot say that every regulation of the purifying type is inconsistent with a system of free expression. In theory such restrictions may, by limiting the freedom of some, expand the freedom of a greater number. In practice, certain types of restriction have been employed without proving destructive. The basic principle, just stated, must therefore allow for limited exceptions. But the restriction must be considered an *exception*, with proponents having the burden of showing that it is clearly necessary to correct a grave abuse in the operation of the system; that it is narrowly limited to that end; that it does not limit the content of the expression; that it is in the nature of a regulation, not a prohibition, and does not substantially impair the area of expression controlled; that the objective cannot adequately be achieved by other means; that the regulation can be specifically formulated in objective terms; that it is reasonably free from administrative abuse; and that it operates equitably, with no undue advantage to any group or point of view.[93]

93. Regulations which would be justifiable under the above principles were upheld in Burroughs v. United States, 290 U.S. 534 (1934); United States v. Harriss, 347 U.S. 612

By way of illustration, it may be said that certain restraints on expenditure of money in political campaigns, or in direct contacts with the legislature, would qualify as falling within the area of exception. On the other hand registration or disclosure which substantially interferes with expression, as in the case of unpopular groups whose activities would be curtailed by disclosure, would not qualify for the above enumerated exceptions. Similarly, group libel laws would not meet the test.

3. Protection of the System Against Interference From Private Sources

The government has, of course, traditionally exercised the function of protecting the right to freedom of expression against interference by other persons through the use of force or violence. No issue under the first amendment arises; the major problems relate only to matters of enforcement. But to what extent should the government assume the function of protecting the right of expression against pressures which fall short of force or violence? Here the issues become more troublesome.

Clearly the government can not and should not undertake to eliminate all pressures from private sources—economic, social, personal and so on—which may affect the volume, content or manner of expression. The very process of reaching social decisions assumes that such pressures will be constantly at work. In the functioning of our society, however, certain problems have emerged which seem to call for government action. These include such matters as the use of economic pressure by employers, landlords or creditors to prevent the exercise of the right to participate in the elective process; the use of property rights by owners of company towns to interfere with the distribution of literature or similar activity; and the organization of certain types of boycotts by powerful organizations to prevent certain kinds of communication. Where the government undertakes to protect the system of freedom of expression against obstructions of this nature through legislation, no problem under the first amendment is presented so long as the regulation is addressed to "action" rather than "expression." In the absence of legislation, the first amendment may properly be invoked to protect freedom of expression if the source of obstruction is the government itself or even a non-governmental organization

(1954); Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913). A restriction not justifiable under these principles was held invalid in Talley v. California, 362 U.S. 60 (1960). Restrictions not justifiable under these principles were upheld in Beauharnais v. Illinois, 343 U.S. 250 (1952); United States v. UAW, 352 U.S. 567 (1957); *cf.* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

Fraud or misrepresentation of business character falls into an area outside the system of the freedom of expression. Communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression. The principles governing commercial speech, and the relations between this sector and the area of free expression, have never been worked out. See, *e.g.*, Cammarano v. United States, 358 U.S. 498 (1959). That task is not attempted here. Up to the present, the problem of differentiating between commercial and other communication has not in practice proved to be a serious one.

possessed of equivalent powers; in such cases the principles previously discussed are applicable.[94]

A special, important and exceedingly complex problem arises, however, in connection with membership rights in voluntary associations. One of the outstanding characteristics of modern democratic society has been the development of private, in the sense of non-governmental, centers of power. Numerous organizations, such as labor unions, business associations, professional societies, and many others, wield increasing power in the economic, political and other spheres of our national life. In many areas the individual alone is helpless to protect or advance his interests, and can operate effectively only through an organization. This pluralism is a vital feature of our complex society, but it is beginning to create serious issues for the maintenance of an effective system of free expression.

These private centers of power have come to possess extensive authority over the welfare of their individual members. Moreover, they often generate large and impersonal bureaucracies, which tend to have a life and direction of their own. Frequently such organizations exercise monopolistic or near monopolistic power, as in the case of a labor organization operating under a closed shop arrangement, or a medical association with control over access to hospitals. And very often they are supported or regulated by government, so that they take on even more the character of quasi-public institutions.

The basic problem is to what extent the principles which are applicable to government in its relationships with individuals should apply to these private centers of power in their relationships with individuals; and by what methods and institutions should any such applicable principles be enforced. These questions present novel and perplexing issues.[95]

As the situation has thus far developed, two aspects have come to the fore. First, there are a series of questions involving the right of individuals to join and participate in the affairs of the organization. Should there be limits on the power of the organization to admit, expel or discipline members? What measures, if any, should be adopted to assure that the organization operates in accordance with democratic procedures? What rights should individuals or minority groups have to criticize or oppose the policies and practices of the organization, either from the inside or outside?

A second series of questions revolves around a closely related matter. Many organizations, formed primarily or in part for purposes other than expression, also engage in various forms of political expression. Where economic or other conditions create pressure on individuals to join such organizations, or where the government requires individuals to join or otherwise protects the organization's monopoly, a serious issue arises over the expenditure of organizational funds for political purposes contrary to the wishes of a minority of the membership. Thus far these issues have been presented where a labor organi-

94. See Marsh v. Alabama, 326 U.S. 501 (1946).

95. See also Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620 (1958).

zation operating a closed shop, or an integrated bar association, has engaged in political activity. The precise question is whether the government should protect the minority interest in this situation, apart from the matter of assuring democratic procedures, by prohibiting the organization from carrying on the political activity with funds contributed by the dissenters.

There are dangers from the intrusion of governmental regulation into these or comparable matters. Any form of government control reduces the capacity of the organization to function independently, and particularly to resist the government which has power over it. Once the principle of governmental restriction is accepted for any purpose it becomes difficult to establish a stopping place. Problems tend to be settled by resort to further public controls, rather than to be left to internal reform. Experience indicates there is little probability of turning back; movement is likely to be all in one direction. Hence we must start with a presumption against the need for government regulation.

However, on occasion, government regulation may be the lesser evil and we seem to have reached this point already in some situations. The need for government intervention will turn upon various factors, including the importance of the function that the organization performs and the capacity of the group concerned to assure the protection of individual rights through self-regulation. In addition, it will depend upon whether conditions are such that a multiplicity of organizations can exist in the area affected, or whether circumstances drive toward a monopoly. In the former case, there is minimum need for governmental controls; dissidents can withdraw and form their own association. In the latter case such diversity is not possible and the choice may be between regulation or unregulated monopoly. Beyond this the problem is one of finding a satisfactory balance between preservation of the individual or minority right and effective performance of the organization's functions.

Issues under the first amendment arise in either of two settings. Legislation attempting to deal directly with the problem may be challenged as infringing upon first amendment rights of association. Or, in the case of organizations subject to some measure of governmental regulation in other matters, a right may be asserted in judicial proceedings by individuals on the theory that sufficient "state action" is involved to bring first amendment protection into play. In neither case has the application of first amendment doctrine been clearly formulated.[96]

In the first type of case—where government regulation aimed at protecting expression is alleged to interfere with rights of free association—two distinctions should be made which would provide the basis for deciding when an "abridging" of freedom of expression occurs. First, it is necessary to distinguish between organizations which are to be considered as operating in the public sector and those which operate in the private sector. A labor organization or

96. The major federal legislation of this type—the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519—has not been tested in the Supreme Court. The leading case in which the issue was presented to the courts under a claim of "state action" is International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

medical association possessing quasi-monopolistic powers, or an integrated bar association, by reason of their functions, powers and extent of governmental support would provide the clearest instance of associations falling within the public sector; in contrast, a social or recreational club would most clearly come within the private sector. The line between is shadowy, and would have to be drawn in the light of concrete circumstances.[97] Wherever the line is drawn, the right of association under the first amendment would preclude governmental regulation of the type here involved in the case of associations in the private sector. Secondly, assuming the organization is in the public sector, the validity of government regulation under the first amendment would be controlled by the principle that the restriction imposed on association or expression be necessary for protection of the system of freedom of expression; that it not be of such a character as substantially to impair the functioning or frustrate the legitimate objectives of the association; and that it otherwise conform to the principles stated above in connection with government regulation designed as purification of the democratic process.[98]

In the case of claims by individuals against restrictions of expression by "private" organizations, presented on the theory that the group's restriction constitutes "state action," somewhat similar principles would apply. In addition the court is faced with the problem of defining the term "law" as used in the first amendment. An association classified as in the private sector would not be subject to any first amendment requirements, no "state action" or "law" being involved. Where the organization operated in the public sector, the issue would turn upon the question whether, in light of the relations between government and the association, the requirements for maintaining an effective system of freedom of expression demand judicial protection of the right asserted. Certainly in this area the courts should proceed slowly. But where government support is substantial and the first amendment right clear, the courts, in performing their function of giving positive support to the system of free expression, should act to protect the right. The decision of the Supreme Court in the *Street* case, while provoking disagreement as to the manner in which the right should be protected, would appear to have reached a sound conclusion as to the underlying first amendment question.[99]

The doctrines applicable here are, of course, much looser than where direct governmental curbs on free expression are in issue. But, in this context, their generality and flexibility would not appear to involve any danger to the system of freedom of expression, but rather would afford the capacity for development to meet the basic problems presented by the operation of voluntary associations. It seems unlikely that government action in these areas will be carried too far in the foreseeable future. The balance of forces in our society tends

97. For discussion of the problem, in a somewhat different context, see C. Black, Jr., *The Constitution and Public Power*, Yale Review, Autumn 1962, p. 54.

98. See text accompanying notes 92-93 *supra*.

99. International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). *Cf.* Lathrop v. Donohue, 367 U.S. 820 (1961).

rather in the other direction. Certainly an excess of governmental control here has so far not proved to be a serious matter.

4. Affirmative Measures to Increase the Effective Operation of the System

It is possible here only to point out certain areas in which the problem of governmental encouragement to freedom of expression has arisen, and to suggest tentatively some of the principles which may be applicable in guiding this development.

(1) The most common form of governmental assistance to freedom of expression is the furnishing of facilities for communication. Traditionally streets, parks, commons and similar open public places have been used for meetings, parades and other forms of expression. Clearly there should be a right for any person or group to use such public property, subject only to restrictions of the traffic control type.

The use of public buildings presents a somewhat different problem. It cannot be said that private persons or groups have a legal right to use such structures for meetings or similar private purposes. But it is certainly sound policy for the government to make public buildings available for this use. Where this is done, the applicable principle is that the public facility should be open to all on an equal basis; no differentiation based upon the content of the expression is permissible.

At the present time the furnishing of government facilities has not progressed much beyond this point. But suggestions have been made for extension of government participation. Thus it has been proposed that the government furnish funds to be used in election campaigns, that government control and allocate newsprint, or that it take over all broadcasting facilities. Such an expansion of government functions would raise very serious issues. Dependence upon the government to this degree for the facilities of communication clearly poses grave dangers to the whole system of free expression. Moreover, even if techniques were evolved to minimize this danger, extraordinarily difficult problems would arise in attempting to administer the basic principle of equality of treatment to minority groups, to new groups being formed, to individuals not sharing the viewpoint of any group, to "crackpots," and so on.

(2) Development of the mass media of communication in this country raises the most pressing current questions as to the scope of government measures necessary or advisable for maintaining an effective system of free expression. The problem has been clear for some time. More and more control over communication is being centralized in the hands of a small group which owns and operates the mass media. As a result the communication reaching most members of the community conforms to a single pattern; other views are rarely or never heard. Instead of a system of open communication, in which all the facts and a diversity of opinion are available in the market place of ideas, our system approaches a closed one in which only a single point of view with minor variations, can find an outlet.

What can or should be done about this organization of our system of communication? Thus far government action has largely been confined to two

areas. One is the use of the anti-trust laws as a deterrent to monopoly. Here no serious problem of principle is involved. Insofar as the anti-trust laws encourage diversity of control and variation in expression they clearly promote freedom of expression. Their impact being upon the majority or predominant views, they are scarcely a threat to minority or unpopular expression. In practice, of course, the anti-trust laws have had little effect upon prevailing trends and hence have not contributed much to the solution of the underlying problem.

The other area of governmental action has been the licensing of radio and television stations, made necessary by physical limitations upon the number of wave lengths. Exercise of this function necessarily involves the development of principles governing the choice of stations to be licensed, including principles relating to the measure of government control over the content of the program. But little progress has been made. The need is to formulate reasonably concrete standards, based upon the underlying principle of public service and diversity. Equally important, it is necessary to develop the institutions and techniques for applying the standard and supervising that application.

(3) A third set of questions concerns what has come to be called "the right to know"—the problem of secrecy in government. Here again the issue is clear. Successful operation of a democratic society, and particularly the functioning of a system of free expression, depends upon members of the society having access to the information necessary for making decisions. But more and more of this essential information is being withheld by the government for reasons of military secrecy, foreign policy, or simple face-saving. This is not an area where the courts, applying first amendment doctrines, can be of much assistance. But the principle which should be followed by the legislature and executive is plain: the maximum amount of information should be disclosed. Implementation of the principle is difficult and little progress has been made in developing techniques for its realization in practice.

E. *Government Participation in Political Expression*

The function of government has never been confined to regulating the free play of expression by private individuals or groups. The government itself has always participated in the market place of ideas. With the growth of modern industrial society this activity of the government has become ever more pervasive and more significant.

Government activity in the field of expression takes many forms. It includes statements by public officials, publications of all kinds, and the operation of opinion-forming institutions, primarily the system of education. Few limitations have been imposed upon expression by the government, except its own self-restraint, and little thought has been given to the development of principles which should control its action in this field. At this point it is possible only to state certain broad generalizations.

Where the government voice is not the exclusive one in a field, but must compete with expression by private individuals or groups, there is less need of limitation. Thus government statements and publications in most instances

enter a market place to which nongovernmental sources have access. They are subject to contradiction, modification, or testing against statements or publications by newspapers and similar forms of communication. But where the government expression operates as a monopoly, or near monopoly, some principles of limitation may be necessary. Such a situation arises, for example, in the field of education, which is a nearly-closed system under the control of the government. Here the possibilities of nongovernmental communication offsetting the government influence are small or non-existent.

What the principles of limitation should be, and how they can be enforced against the government, raise difficult questions. But it is not impossible to formulate some guiding lines. One such principle may be found in the concept of balanced presentation. Under this principle it would be the obligation of the government to present a fairly balanced exposition of the various relevant points of view, and of the alternatives open for action. The developing theory of academic freedom furnishes some basis for expanding and refining such a concept. Another principle is that the government may not engage in political expression where it addresses a captive audience.[100] In the administration and enforcement of such principles institutional safeguards, including judicial review, would have to be devised or perfected.

Traditional doctrines of freedom of expression do not provide theories of limitation in these areas. But the need for addressing ourselves to these questions and endeavoring to frame the controlling principles is great.

VI. Conclusion

In the first part of this article we have attempted to set forth the various factors upon which any non-verbal interpretation of the first amendment must rest. Without undertaking to summarize those considerations, we may emphasize two of the major conclusions that emerge. One is that the essence of a system of freedom of expression lies in the distinction between expression and action. The whole theory rests upon the general proposition that expression must be free and unrestrained, that the state may not seek to achieve other social objectives through control of expression, and that the attainment of such objectives can and must be secured through regulation of action. The dynamics of the system require that this line be carefully drawn and strictly adhered to. The acceptance of this general position was the fundamental decision made in adopting the first amendment, and this balance of values and methods must be recognized in any interpretation of that constitutional guarantee.

The other conclusion is that conditions in a modern democratic society demand that a deliberate, affirmative, and even aggressive effort be made to support the system of free expression. The natural balance of forces in society today tends to be weighted against individual expression. Only through a positive approach, in which law and judicial institutions play a leading role, can an effective system be maintained.

100. See Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952).

Our second task has been to formulate a basic theory and specific legal doctrines which would take into account the underlying factors. Such a theory must start by accepting the prior judgment embodied in the first amendment. The issue before the court cannot therefore be a de novo balancing of different social values and objectives involved in each case. Rather the issue must be framed in terms of ascertaining the area of expression which it is the purpose of the first amendment to protect, the kind of governmental action which constitutes an infringement of that area, and the nature of ostensibly private action which nevertheless carries the imprint of government authority to such an extent that it, too, should be considered an exercise of state power. In more formal language these are questions of defining the key terms of the first amendment: "freedom of expression," "abridge," and "law." The definitions sought must be functional in character, derived from a consideration of the basic elements which shape and determine an effective system of freedom of expression.

Employing this approach it is possible to spell out in more detail the specific legal doctrines which are applicable to the various types of problems in which a first amendment issue arises. Our efforts to accomplish this have necessarily been summary in form and tentative in result. The endeavor has been to demonstrate that a comprehensive and consistent theory of the first amendment, providing a rational basis for explaining apparent exceptions and remedying deficiencies in existing doctrine, is possible. That theory does give force and meaning to the fundamental judgment embraced in the first amendment and allows the courts to take into account the basic considerations necessary for a realistic solution of the particular problem. At the same time it attempts to provide doctrines at a level of generality, or rather specificity, which permit the courts to perform effectively their functions as judicial institutions.

It is not to be expected that any reader will be wholly satisfied, or will agree with all of the resolutions proposed for the numerous areas of intense controversy. To this writer, these resolutions appear to follow from the premises developed in the earlier part of this article, premises with which most readers probably would agree. Thus, the task is to see that the doctrines offered and the resolutions suggested herein do, in fact, follow from the principles underlying a viable system of free expression. Disagreement should lead to a rethinking of the logic of the deduction; it should not lead to a rejection of the fundamental postulates underlying the first amendment. Thus, the various conclusions expressed, and proposals for working principles made, will certainly need to be elaborated, modified, or perhaps abandoned. But the hope is that they will furnish a rational and acceptable approach for giving significant meaning to the great and vital concept expressed by the first amendment.